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The New Federal Rules and Indiana Procedure (Part II)

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THE NEW FEDERAL RULES AND INDIANA PROCEDURE

Part II.

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V.

Rule 26(a).[1] This Rule deals with depositions pending action and the next Rule deals with depositions before action. The Federal Rules provide one procedure for what is covered in the Indiana law by the separate statutes on deposi-

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Continued from the February, 1938, issue, p. 203-241.

The author acknowledges the valuable assistance of Mr. Robert Gemmill, A.B., LL.B., of the Grant County Bar, graduate student in the Indiana University School of Law, in the preparation of this article as covered by Rules 26-37, 43-45; and again of Mr. Nelson Grills, B.S., J.D., Research Assistant to the Indiana Judicial Council.

[1] Rule 26. Depositions Pending Action. (a) When Depositions May Be Taken. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

tions and conditional examinations.[2] The Rule also provides one procedure for depositions and also for party examination and discovery by use of interrogatories, and the Indiana law has two rather distinct procedures on those matters.[3] This Rule provides for the taking of depositions: (1) *by leave of court* after jurisdiction has been obtained over any defendant or over any property which is the subject of the action; (2) *without leave* after answer has been served. The Indiana statutes make a somewhat different approach. Sec. 2-1505, Burns' 1933 recognizes the right of the court to order the taking of a deposition at any time (when necessary to determine rights or expedite trial) and permits ordering a continuance. The ordering of such a continuance is probably inherent; but it appears to be expressly recognized by the Federal Rules.[4]

The Rule restricts the privilege of taking depositions as of right to a time after an answer has been served, whereas the time under the Indiana statute is fixed after the service of summons.[5]

The Rule provides that "the testimony of *any person,* whether *a party or not,* may be taken at the instance of *any party* by deposition . . ." The inference is that a party may take his own deposition. Although the Indiana Statutes are not specific, they have been so interpreted.[6]

The Rule provides for the taking of a deposition for the "purpose of discovery or for use as evidence." This appears in accord with Indiana law and practice as the statutes on conditional examination and interrogatories to parties are interpreted as taking the place of a bill of discovery. The only two cases found are, however, old and somewhat indefinite.[7]

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[2] Secs. 2-1501-32 (depositions); 2-1728-32 (conditional examination).

[3] Secs. 2-1532; 2-1028.

[4] See, Rules 30 (a) and (b) and 31 (d), *infra.*

[5] Sec. 2-1506; Wehrs v. The State, (1892) 132 Ind. 157, 31 N.E. 779.

[6] Abshire v. Mather, (1886) 27 Ind. 381; Bourgette v. Hubinger, (1868) 30 Ind. 296, 126 N. E. 3; Kwaitkowski v. Putzhaven, (1920) 189 Ind. 119, 126 N. E. 3.

[7] Barnard v. Flinn, (1856) 8 Ind. 204; Mason v. Weston, (1868) 29 Ind. 561.

No Indiana cases have been found on the subject of depositions of prisoners, and no statute makes the restriction of the Rule on this point. The provision that depositions shall be taken only in accordance with rules is necessarily subject to the Rule 29, *infra,* regarding stipulations and undoubtedly states the general result of the Indiana statutes. In Indiana by special statute leave of court is necessary to take an examination in actions involving restraint of trade.[8] Another special statute deals with depositions in divorce actions,[9] but as to the taking of depositions refers to the general statutes on the subject.[10] Other special statutes not dealing with civil actions would not be affected by this Rule.[11]

Rule 26(b).[12] The Indiana statutes do not expressly state the scope of the examination. The Rule does, however, generally state the Indiana law, *i. e.,* the examination must confine itself to the issues and be relevant, being subject to the rules of evidence. The Indiana procedure is to refuse to answer an improper question (upon the volition of the witness or advice of counsel) until ordered by the court to answer.[13] The approach of the Indiana statutes on the subject of scope is toward admissibility after taking.[14]

As to the existence, etc., of books and documents, Sec. 2-1644, Burns' 1933, provides a method for their production.

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[8] See, Sec. 23-121, Burns '33.

[9] Sec. 3-1210, Burns '33.

[10] See also, Sec. 6-1121, Burns '33, as to actions to sell real estate of a decedent.

[11] Sec. 7-409, Burns '33 (proof of wills); 6-911, Burns '33 (concealment of assets of estate); 63-214, Burns '33 (athletic commission); 20-808, Burns '33 (investigation by Fire Marshal).

[12] Rule 26. (b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

[13] See Watson, Vol. 1, Sec. 1186, Pg. 765; Sec. 2-1509, Burns '33.

[14] Sec. 2-1521, Burns '33.

This Rule allows examination of the witness concerning those matters expressly covering a point not so covered by the Indiana statutes, which in general do appear to allow such an examination on deposition. But as to the last point covered by this Rule, the Indiana law is not as broad as it is settled that parties on examination cannot be compelled to give the names of their witnesses or state facts which they expect to prove by them.[15]

Rule 26(c).[16] Rule 43 (b) deals with the scope and manner of the examination of hostile witnesses and adverse parties and this Rule simply incorporates that Rule into the practice so far as depositions are concerned.[17]

Rule 26(d).[18] Under Sec. 2-1519, Burns' 1933 a deposi-

[15] Wabash etc. Co. v. Morgan, (1892) 132 Ind. 430, 32 N. E. 85, interpreting Sec. 2-1728 (before amendment) and Sec. 2-1729, Burns '33.

[16] Rule 26. (c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

[17] See comment on Rule 433 (b) *infra*. Sec. 2-1511 provides that deponent "shall be examined." See n. 13 *supra*.

[18] Rule 26. (d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an

tion must be filed one day before trial. Violation of this requirement is a possible basis for continuance.[19]

(1) Indiana statutes do not particularly provide for such use, but the general right of impeachment is recognized.[20]

(2) The implication in Sec. 2-1730, Burns' 1933, is as broad as this Rule. A conditional examination may be read even though the party who so testified is present.[21]

(3) 1, Sec. 2-1506, Cl. 2 makes an identical provision.

2, Sec. 2-1506, Cl. 1 is the equivalent for Indiana practice, except that the Indiana statute does not expressly prohibit the use of the deposition if the absence was procured by the party.

3, Sec. 2-1506, Cl. 2 covers all of these points except imprisonment. Usually the situation would be covered by Cl. 1, Sec. 2-1506. No Indiana cases have been found on the latter.

4, Sec. 2-1506, Cl. 1 is similar. When read in the light of the statutes on subpoena,[22] the statute is really limited to witnesses not subject to such process. The Rule seems to be broader, however, covering the case where a witness is subject to process but cannot be served because he avoids service.

5, Although the counterpart of this clause in the Rule is not found in Indiana statutes, it is suggested that permission to use by a trial court in this state under circumstances similar to those contemplated by the Rule would not be reversible error.[23]

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adverse party may require him to introduce all of it which is relevant to the part introduced and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

[19] There is no Rule on the subject of continuances. This subject is, therefore, left to local rule under Rule 83.

[20] Sec. 2-1726.

[21] Scott v. Indianapolis Wagon Works, (1874) 48 Ind. 75.

[22] See Rule 45, *infra*.

[23] The same result could be reached by taking the deposition by court order under Sec. 2-1505, Burns '33, and then offering it under Sec. 1-1506, Burns '33, Cl. 3.

(4) This is not as broad as the Indiana rule, as the opposing party in this state may require the whole (rather than just the parts relevant to the parts read) to be introduced.[24]

This rule and Sec. 2-1523, Burns' 1933, are substantially the same. The statute also requires deposition to remain on file, but this has been interpreted not to restrict taking out of clerk's office temporarily and for a proper purpose.[25]

Sec. 2-1506, Burns' 1933, Cl. 3 and Cl. 4 are not expressly covered by the Federal Rule.[26]

Sec. 2-1515, Burns' 1933, providing that the cause of taking must be shown to still exist is not expressly covered; but the cause of use would need to be shown under a reasonable interpretation of the Federal Rules, and the practice would thus be the same.

Rule 26(e).[27] The Rule here stated is substantially the equivalent of Sec. 2-1521, Burns' 1933, but the Rule must be construed in the light of Rule 32(c).[28]

Rule 26(f).[29] No Indiana statute states the substance of this Rule. It is suggested, however, that this states the Indiana law under a reasonable interpretation of the clause in Sec. 2-1529, Burns' 1933, that a deposition "shall be admitted as evidence . . . and shall have like effect . . ."

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24 Watson, Vol. 1, Sec. 1218, p. 782; Scott v. Indpls. Wagon Works, (1874) 48 Ind. 75.

25 Lake Erie etc. Co. v. Huffman, (1912) 177 Ind. 126, 97 N. E. 434.

26 See, however, d (3) 5, which covers the point in general terms.

27 Rule 26. (e) Objections to Admissibility. Subject to the provisions of Rule 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.

28 See also, discussion under Rule 32 (a) to (d), *infra*.

29 Rule 26. (f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 27(a).[30] An Indiana statute makes a similar provision,[31] there being, however, some variation as to procedure.

[30] Rule 27. Depositions Before Action or Pending Appeal. (a) Before Action. (1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the district court of the United States in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a district court of the United States, in accordance with the provisions of Rule 26 (d).

[31] Sec. 2-1524.

(1) *Petition.* Under the Rule the petition must be filed in the district of residence of the adversary party; while in Indiana it may be filed in any circuit or superior court, judge, or clerk thereof, even though the adversary party be without state. Sec. 2-1524, Burns' 1933, is broader in that jurisdiction of a state court over the expected action is not necessarily contemplated. The Rule and the statute provide for a verified petition or an affidavit supporting it. The Rule requires the petition to set out the subject matter of the action, the interest of petitioner, and the facts expected to be proved. This is not required by the statute, which requires that the affidavit show only materiality or necessity.

Sec. 2-1524, Burns' 1933, by fair interpretation contemplates the naming of the witnesses. The Rule requires in addition the addresses of witnesses and the substance of the testimony expected to be elicited from each, as well as a prayer for an order. Sec. 2-1524, Burns' 1933, contemplates an order to be made on filing, and good practice would seem to require a verified petition containing a prayer for the appropriate order.

There appears to be no federal rule on the matter of filing and keeping sealed[32] or on recording and publication.[33] Rather, under the federal rules, the matter is covered by the general rules on depositions during and after taking.[34]

(2) *Notice and Service.*[35] The Rule makes it mandatory on petitioner to serve notice on all adverse parties before submitting petition. Under Sec. 2-1524-5, Burns' 1933, no notice is contemplated to adverse parties except as to the taking of the deposition. Thus, contemplated adverse parties are in court for hearing on the Federal petition, while under the statute they are only subject to the order made (with probably a right to contest its validity under the inherent power of the court).

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[32] Sec. 2-1526.

[33] Sec. 2-1527-8.

[34] See, Rule 30.

[35] For manner of service under Rule 4 (d), see Gavit, "The New Federal Rules and Indiana Procedure," 13 Ind. L. J. 206 *et seq.*; and for applicability to minors under Rule 17 (c), see *ibid*, 232 *et seq.*

In the event service cannot be had under Rule 4(d), the Federal rules permit notice by publication. This type of notice may be ordered under the Indiana statutes.[36] The Rule is stricter, however, in that the court must appoint an attorney or act for a person so served, in case he is not represented.

(3) *Order and Examination.* The orders contemplated by both the Rule and the statute are very similar except that the order under the Rule must specify the subject matter and manner of examination, and the order under the statute must designate the time, place and officer before whom the deposition is to be taken. Thereafter, the Federal examination is under the Rules on depositions and the state examination is under the statutes on depositions.

(4) *Use of Deposition.* The Rule provides for the use of such deposition: (a) as any other deposition may be used under Rule 26(d), *supra;* (b) as a deposition, if taken contrary to rules, but sufficient to be used in the courts of the state in which taken. Thus the Rule as applied in Indiana incorporates into the Federal practice Sec. 2-1524-29, Burns' 1933.

Sec. 2-1529, Burns' 1933, limits the use of depositions taken to preserve testimony to cases between parties or other parties claiming under them where deponent is: (a) dead; (b) insane; (c) absent from state; (d) unable to attend by reason of age; (e) unable to attend by reason of infirmity.

Thus, the use of a deposition taken under Rule 27 is more extensive than under the Indiana statutes.[37]

Rule 27(b).[38] Although a strict interpretation of the

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[36] Secs. 2-1524 and 2-1525, Burns '33.

[37] See comments under Rule 26 (d).

[38] Rule 27. (b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion

wording of the statute[39] would not indicate that a party might take a deposition to preserve testimony while an appeal is pending, such right is recognized.[40] Although the case cited does not so state, it would seem to follow that such a deposition ought to be taken under the requirements of Sec. 2-1524, Burns' 1933.[40a] Under the Rule, therefore, the procedure to obtain the order is simpler, *i. e.* a showing by motion in the district court of (1) the name of the witness and (2) reason for perpetuating testimony. The order made on such a motion is that the deposition be taken as in a case pending in the district court under the same rules and in the same manner as depositions are generally taken.

Rule 27(c).[41] Although "the right to perpetuate testimony was established many centuries ago by civil law,"[42] no case has been found in Indiana involving an action in the form of a Bill to Perpetuate Testimony. The problem presented is as to whether or not the statutes completely supersede the equitable procedure.

Rule 28(a).[43] The provision in this Rule including officers of the United States authorized to administer oaths before whom a deposition could be taken would add to the Indiana statute on this point. In Indiana, the deposition could be

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shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

39 Sec. 2-1524.

40 Long v. Straus, (1890) 124 Ind. 84, 24 N. E. 664.

40a See, however, note 42 *infra.*

41 Rule 27. (c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

42 18 C. J. 609.

43 Rule 28. Persons Before Whom Depositions May Be Taken. (a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

taken before the Clerk of a United States Court as this is a court of record. The following are authorized by Indiana statutes: Judge, Justice of the Peace, Notary Public, Mayor or Recorder of City, Clerk of Court of Record, Commissioner Appointed by Court;[44] Commissioner, under commission from Clerk (foreign country only);[45] Court Reporter;[46] Master Commissioner (appointed by Judge);[47] Commissioner of Deeds (appointed by Governor);[48] Member of the Indiana General Assembly;[49] Prosecuting Attorney.[50]

Rule 28(b).[51] This Rule is more extensive than the Indiana statutes,[52] providing only for a commissioner, the commission to be issued by the clerk. Indiana makes no provision for the use of letters rogatory,[53] but it is suggested that this procedure would be advantageous.

Rule 28(c).[54] This Rule and Sec. 2-1501, Burns' 1933, (by interpretation) are substantially the same. Thus, under the Indiana statute, "kin to either party or interested in the action" includes: "A clerk or stenographer in the office of attorneys employed in a cause is not disinterested so as to

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44 Sec. 2-1501.

45 Sec. 2-1516.

46 Sec. 4-3509.

47 Sec. 4-3404.

48 Sec. 49-3602.

49 Sec. 49-3513.

50 Sec. 49-2507.

51 Rule 28. (b) In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

52 Sec. 2-1516-18.

53 See Rule 37 (e) *infra.*

54 Rule 28. (c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

take a deposition."[55] No case has been found as to "financial interest," but this would certainly be included in "interested (legally) in the action" under the strict interpretation of the statute made by the cases above referred to.

Rule 29.[56] Indiana statutes do not specifically provide for such a stipulation, but the statutes and decisions do recognize that some stipulations may be made.[57]

Rule 30(a).[58] The Rule requires notice on all parties, while Sec. 2-1502, Burns' 1933, requires notice only on one who is a real party in interest. The Rule does not require notice to state (a) the cause or matter in which deposition is to be used or (b) the court or tribunal, but these are required by Sec. 2-1502, Cl. 1 and 2, Burns' 1933. The Rule empowers the court to lengthen or shorten the time specified in notice. Sec. 2-1503, Burns' 1933, contemplates a "reasonable time," and it is a fair inference that the determination of this is within the power of the court. The special statute relating to actions involving restraint of trade[59] specifies a five-day notice. This is at variance with the Rule, in which no time is specified. Manner of service and manner of proof thereof is not set out in this Rule and is covered by Rule 5.

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[55] Watson, Vol. 1, Sec. 1164 and cases cited.

[56] Rule 29. Stipulations Regarding the Taking of Depositions. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

[57] See Sec. 2-1506, Cl. 3 and Sec. 2-1508, Burns' '1933. See, Griffin v. Templeton, (1861) 17 Ind. 234; McMullen v. Clark, (1874) 49 Ind. 77; Estep v. Larsh, (1863) 21 Ind. 183. See also, Flowers v. Poorman, (1909) 43 Ind. App. 528, 87 N. E. 1107, giving effect to agreement changing date of taking of deposition.

[58] Rule 30. Depositions Upon Oral Examination. (a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

[59] Sec. 23-121.

This is covered in Indiana by Sec. 2-1504, 2-1637, Burns' 1933.

Rule 30(b).[60] This is far broader than the Indiana statutes. Whether the matters of orders herein provided are within the inherent power of the court is a matter of speculation, no authorities having been found in this state. The Rule appears to be desirable.

Rule 30(c).[61] *Oath.* Secs. 2-1511 and 2-1711, Burns' 1933, are the equivalent of the Rule.

Record of Examination. Sec. 2-1512, Burns' 1933, is the equivalent of this Rule, except that the manner of taking the examination and the conduct of any party would not be included generally, unless intentionally read into the record. It is possible that this would be the interpretation of this part of the Rule.

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[60] Rule 30. (b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

[61] Rule 30. (c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

Evidence Subject to Objections Made. This seems to be the Indiana practice, but see discussion under Rule 32, *infra,* as to manner and time of effective objections.

Interrogatories in Lieu of Participating. Indiana statutes do not contemplate such a practice. It is to be noted, however, that the reverse is true in Indiana, *i. e.,* on three-day election after receiving notice of taking by interrogatories under Sec. 2-1532, Burns' 1933, a party may orally cross-examine. This is not within the Federal rules.

Rule 30(d).[62] This Rule empowers the court to make orders within its discretion during examination similar to 30(b), and would be new to Indiana law as an express provision on the subject. See comments under Rules 26(b) and 30(b) for a discussion as to the inherent power of court and the Indiana practice in this connection.

Rule 30(e).[63] The comparative statute is Sec. 2-1512, Burns' 1933, which, by judicial decision, approaches the same

[62] Rule 30 (d). Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

[63] Rule 30 (e). Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed,

operative effect of this Rule.[64] The Rule is advantageously specific on all points involved. It is interesting to note that Sec. 2-1532, Burns' 1933, on interrogatories is a nearer approach to this Rule.[65]

Rule 30(f).[66] (1) This Rule and the Indiana statutes[67] are the same, except that Sec. 2-1513, Burns' 1933, further requires certificate to show: (a) fact of attendance of adverse party; (b) time, place, and hours; (c) seal, if any, of officer. Sealing and indorsement requirements are the same[68] except that the Rule requires registration if mailed to clerk.

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unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

64 "In case a deposition or examination is taken in shorthand, and afterwards copied in longhand, and presented to a witness or party for his signature, there can be no doubt as to the right of such witness or party to have any such corrections made therein as may be necessary to make it speak the truth. If an answer has been incorrectly taken down, he may have this corrected, or if by mistake or through a misunderstanding of the question he has made a wrong answer, he has a right to explain this fact. Such corrections and explanations should be made, however, before the notary who is engaged in taking the examination, either on motion to the opposite parties or his attorneys, or on voluntary appearance. On such corrections and explanations being made, either party would then have the right to ask further questions." Rump v. Woods, (1911) 50 Ind. App. 347, 98 N. E. 369. This case was cited with approval in Cleveland, etc. R. Co. v. Baker, (1920) 190 Ind. 633, 128 N. E. 836.

The statute does not, however, make provision for no signing under the circumstances prescribed by the Rule.

65 See Rule 31 (b) *infra.*

66 Rule 30. (f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

67 Secs. 2-1513 and 2-1730. However, Sec. 2-1517 makes some additional requirements if a deposition by commission is involved.

68 Sec. 2-1514, Burns' 1933.

(2) This is not provided for by Indiana statute, but it is certainly the general practice.

(3) This is not required by Indiana statute, and the Rule is an innovation.[69]

Rule 30(g).[70] Sec. 2-1531, Burns' 1933, combines the subject matter of (1) and (2) of this Rule. The Rule is broader, the Indiana statute providing for a $2.00 judgment and mileage and not providing for attorney's fees.

Rule 31(a).[71] The comparative statute is Sec. 2-1532, Burns' 1933. Both the Rule and the statute contemplate serving interrogatories and notice, such notice under the Rule being more extensive in that the address of the witness must be set out. As to the designation of the officer, under the Rule it is designated by the party, and under the statute it is designated by the clerk. As to cross-interrogatories, under the Rule they must be filed within ten days, and under the statute within five days. As to re-direct and re-cross

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[69] See Indiana filing and publication statutes, Secs. 2-1519-20.

[70] Rule 30. (g) Failure to Attend or to Serve Subpoena; Expenses.

(1). If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

[71] Rule 31. Depositions of Witnesses Upon Written Interrogatories. (a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

interrogatories, they are not provided for by the statute and no cases on the point have been found. As to refusal to answer, see Rule 37(a) and (b), *infra.*

Rule 31(b).[72] See Rule 30(c) for a discussion of the Indiana practice on this provision. Sec. 2-1532, Burns' 1933, is quite similar to Rule 30(e) *supra* as to submission of answers, changes and signing, and to Rule 30(f) as to certification, etc. The statute prohibits the presence of the parties, however, and the Rule does not. The registered mail and notice of filing requirements (being incumbent on party taking deposition) would be innovations under Sec. 2-1532, Burns' 1933 (as they were by Rule 30(f) (1) and (3)).

Rule 31(c).[73] This was probably the rule by inference under Rule 31(b) wherein reference was made to Rule 30(f). As before stated, this Rule would be an innovation in the Indiana practice.

Rule 31(d).[74] See discussion under Rule 30(a) and (d), *supra.* This Rule gives still more express discretion to the court by permitting an order changing the officer[75] or changing the manner of the examination from interrogatories to oral examination. Under Sec. 2-1532 a party may, however, cross-examine orally if he wishes, without a court order.

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[72] Rule 31. (b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

[73] Rule 31. (c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

[74] Rule 31. (d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

[75] Not applicable in Indiana at present, as the Clerk designates the officer. See Rule 31 (2) *supra.*

Rule 32(a).[76] This Rule would change the Indiana practice, as under Sec. 2-1522, Burns' 1933, the decisions hold that defects in notice are subject to a motion to suppress at any time before entering trial.[77] It is suggested that a similar rule adopted in Indiana would be interpreted so that an appearance would constitute a waiver of defects, as a reasonable interpretation of Rule 32(a) would be that the written objection would necessarily be served before hearing to be "promptly served." Similarly under Rule 30(a), *supra,* a result similar to that reached in *Black v. Marsh* would be reached upon failure to give any notice.

Rule 32(b).[78] This would constitute a change in Indiana law.[79]

Rule 32(c).[80] (1) This is in accord with Sec. 2-1521, Burns' 1933, except as to the qualifying clause, *i. e.,* "unless

[76] Rule 32. Effect of Errors and Irregularities in Depositions. (a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

[77] Pape v. Wright, (1888) 116 Ind. 502, 19 N. E. 459; Voorhees v. Cragun, (1916) 61 Ind. App. 690, 112 N. E. 826; Cohen v. Reichman, (1913) 55 Ind. App. 164, 102 N. E. 284; Stalker v. Breeze, (1917) 186 Ind. 221, 114 N. E. 968. Although an appearance at the taking of the deposition waives defects in the notice: Voorhis v. Cragun, *supra.* But failure to give notice makes the deposition incompetent against a party not given notice, unless he appears: Black v. Marsh, (1903) 31 Ind. App. 53, 67 N. E. 201.

[78] Rule 32. (b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

[79] See, Knickerbocker Ice Co. v. Gray, (1905) 165 Ind. 140, 72 N. E. 869.

[80] Rule 32. (c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them

the ground of objection is one which might have been obviated or removed if presented at that time."

(2) No specific cases on the first point have been found, but this Rule would appear to change the Indiana law wherein, generally, defects on the face of deposition are subject to objection up to the time of trial, and defects not apparent may be raised thereafter under Sec. 2-1522, Burns' 1933. As to the form of questions or answers, this Rule appears to permit leading questions if no objection is made and is a departure from the present Indiana law.[81]

(3) No Indiana cases have been found on this point. It is suggested, however, that in the light of the statutes providing for waiver of defects not properly questioned at an appropriate time this Rule is in keeping with the general Indiana practice.[82]

Rule 32(d).[83] Comparative Indiana statutes are Secs. 2-1522 and 2-1530, Burns' 1933, and no helpful cases have been found. It would appear that this Rule would actually operate to place a greater burden on the opposing party to make a more seasonable objection than now exists in the Indiana practice. It is true that the Indiana law has been hesitant to suppress a deposition for comparatively minor defects.

within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

81 "The nature and manner of propounding questions is the same as on the trial of a cause, and objections to questions may be made in the same way and for the same reasons as on the trial. However, as the officer has no power to determine whether the questions are proper ones, it is not necessary to make objections to questions at the time in order to present any question as to the competency or admissibility of evidence. That may be done on a motion to strike out or suppress certain questions and answers at the trial. The questions should be answered, whether proper or improper, and the question of their competency determined by the trial court." Watson, Vol. 1, Sec. 1186, p. 765.

82 See also, general discussion under (d) *infra.*

83 Rule 32. (d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Thus, the absence of the seal of a foreign notary was held cured by a certificate of his qualifications.[84] Objections to indorsements must be made before publication.[85] As against a motion to quash, the deposition may be returned for correction of the certificate.[86] Under Sec. 2-1530, Burns' 1933, there are numerous cases holding that immaterial deviations are to be disregarded.[87]

Rule 33.[88] The comparative statute is Sec. 2-1028, Burns' 1933. As to failure to answer, see discussion under Rule 37, *infra*. This Rule requires service of interrogatories by any party on the other whereas the statute requires filing in court.

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[84] Pape v. Wright, (1888) 116 Ind. 502, 19 N. E. 459.

[85] Lingenfelser v. Simon, (1874) 49 Ind. 82.

[86] Hale v. Matthews, (1888) 118 Ind. 527, 21 N. E. 43.

[87] See, King v. State ex rel., (1860) 15 Ind. 64, holding that adjournment without noting reason therefor to be proper, and even if not would not constitute error unless prejudice be shown, under Sec. 2-1530, Burns' 1933; Welhorn v. Swain, (1864) 22 Ind. 194, holding variation in administration of oath an unimportant deviation under Sec. 2-1530, Burns' 1933; Trout *et al.* v. Williams, (1867) 29 Ind. 18, holding certificate signed by deputy clerk sufficient, it being act of clerk; Ramsey v. Flannagan, (1870) 33 Ind. 305, holding certificate need not set out form of oath; Harvey v. Osborn, (1877) 55 Ind. 535, holding notice stating "city" instead of "town" immaterial; Hay v. State *ex rel.*, (1877) 58 Ind. 337, holding statement in certificate that party had not appeared in "person or by attorney" sufficient; Payne v. West, (1884) 99 Ind. 390, holding "the *deponent* was reduced to writing" was immaterial clerical error; Cadick Co. v. Valdosta Co., (1919) 72 Ind. App. 534, 126 N. E. 240, holding that statutes on return of deposition by officer to clerk are liberally construed, and that misspellings and abbreviations if unimportant deviations do not constitute prejudice.

[88] Rule 33. Interrogatories to Parties. Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

The Rule does not specify the time within which an interrogatory must be served. Sec. 2-1028, Burns' 1933, requires that interrogatories must be filed with the pleadings. But this has been liberally construed, and cases hold that interrogatories need not be filed under this Statute at the same time as the pleading, but must be filed before the issues are closed, or the right to plead further is past.[89]

The Rule provides that interrogatories must be answered "separately and fully in writing under oath" while Sec. 2-1028, Burns' 1933, requires that interrogatories "must be answered . . . positively and without evasion." The statute also provides for answer under oath; and on that point the Rule and statute are substantially the same. The statute, however, further provides that the answering party may also "set forth in his answers, all relevant matters in avoidance." With reference to this clause Watson states: "The party 'is not required to confine himself to a simple and unexplained negative or affirmative response to questions thus put to him, but he may give such explanations and state such circumstances as are necessary to a full and fair understanding of the matters on which he is interrogated'."[90]

It is suggested, however, that inasmuch as the Rule contemplates that objections to interrogatories are to be made by motion within ten days such objections would contemplate matters of relevancy of the answers solicited and the framing of the questions in such manner as not to prejudice the parties.

The Rule specifically requires signing, while perhaps an acknowledgment would be a substantial compliance with the statute.

The statute does not provide specifically for objections to be made to interrogatories, but the authorities holding that the proper remedy is a motion to strike out, upon the theory

89 Sherman, *et al.* v. Hogland, (1881) 73 Ind. 472.

90 Sec. 815, citing, Railsback v. Koons, (1862) 18 Ind. 274. See also, "Discovery by Interrogatories" by Daniel H. Ortmeyer, 4 Ind. L. J. 553, 539 (1929).

that once answered, the interrogatories and answers may be used as admissions, are numerous.[91]

The Rule and the statute contain similar provisions as to answers by officers of corporate parties against whom interrogatories are directed. In Indiana, a corporate party served may and must select an agent to answer, familiar with the facts.[92]

The Rule provides for serving a copy of answers within fifteen days after delivery of the interrogatories. The Indiana practice is different, the procedure being to obtain a rule to answer interrogatories, the court specifying the time for answer in its order granting the rule.

The statute provides specifically for the use of interrogatories and answers by the party propounding them. This Rule is silent on the subject of use, the matter being covered in Rule 26(d) *supra* under which it would follow that either party might use them.

The Rule is broader than the Indiana statute as limited by the proviso requiring the opposite party to be in court or party filing to also file affidavit in order to continue cause (if necessary) in order to have interrogatories answered. It is suggested that the absence of such a proviso from the Federal rule is not a serious departure from Indiana practice, although in those cases where it becomes incumbent upon the propounding party to file the affidavit, it does constitute a change.

The foregoing discussion is generally applicable to the comparison of the Rule and the special statute on interrogatories and examinations in actions involving restraint of trade.[93]

The Indiana statute does not specifically confine a party to one set of interrogatories, but such is the rule.[94] Thus the Federal rule and statute are in accord.

There are no limitations as to types of civil cases in which interrogatories are proper in the Rule, but the Indiana cases

91 See Watson, Sec. 811.

92 Cleveland, etc. R. Co., (1905) 165 Ind. 381, 74 N. E. 509.

93 Sec. 23-121.

94 Davis v. Davis, (1889) 119 Ind. 511, 21 N. E. 1112.

hold that statutes in certain types of cases prohibit use of interrogatories.[95]

Rule 34.[96] This subject matter is covered in Indiana by Sec. 2-1644, 5, Burns' 1933. The Rule provides for obtaining an order on motion and notice. Although the second statute is not specific as to procedure, a motion and notice to the opposing party as the basis of obtaining the order (which is the procedure under the preceding statute, Sec. 2-1644) is the common practice under Sec. 2-1645, Burns' 1933.[97] The statutes do not include the word "custody," but this would certainly be included in "control." The Federal rule excludes privileged documents, etc. Although the statute is not specific on this point, such is the rule, though somewhat broader.[98] The Rule allows "photographing," but this would probably be a form of "copying" under the statute. Also, the Rule uses the words "accounts, letters, photographs, objects, or tangible things" and is perhaps broader than the Indiana statute designating only "books, papers or documents." The

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[95] In divorce proceedings: Barr v. Barr, (1869) 31 Ind. 240; Simons v. Simons, (1886) 107 Ind. 197, 8 N. E. 37. See also, 6 Ind. L. J. 551-3 (1931). In condemnation proceedings: Smith v. Cleveland, etc. R. Co., (1907) 170 Ind. 382, 81 N. E. 501.

[96] Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

[97] See, Watson, Sec. 1280, and Secs. 1282-3.

[98] "If the document or book be one which, for reason of public policy or other sufficient reason, the party should not be compelled to exhibit, the exemption may be shown in answer to the rule or order." Whitman, Rec. v. Weller, (1872) 39 Ind. 515. Watson suggests that the better practice is to resist the motion on this ground. Sec. 1284.

statute does include letters.[99] The materiality of the books, etc. as evidence is recognized in both the Rule and the statute, the former being more specific. Under the Rule, the court fixes the time, place and manner of inspection. The statute only requires a specified time to which the opposing party must comply.

No comparative statutes or cases have been found in Indiana as to the provision for entry on land. As to a failure or refusal to permit inspection, etc., see discussion under Rule 37(b) (2), *infra.* The special statute in matters involving restraint of trade[100] substantially embraces the provisions of both Secs. 2-1644 and 2-1645, Burns' 1933.

Rule 35(a).[101] The right to have an order for mental or physical examination of a party, where such condition is in controversy, is purely a common law right by judicial decision and is not statutory in Indiana.[102]

Both the Rule and the Indiana rule as established by the cases above cited fix the procedure by order of court obtained on motion, the Rule requiring notice to all other parties and

99 Home Ins. Co. v. Overturf, (1905) 35 Ind. App. 361, 74 N. E. 47. No other cases have been found.

100 Sec. 23-121.

101 Rule 35. Physical and Mental Examination of Persons. (a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

102 The case of City of South Bend v. Turner, (1901) 156 Ind. 418, 60 N. E. 271, is the first case definitely establishing the present Indiana doctrine, overruling older *contra* cases. This case holds in substance that the right to an examination is within the sound discretion of the court, that request by motion should be made prior to entering on trial, that flagrant abuse of discretion is reviewable, and that failure to comply is not punishable by contempt, but by delaying or dismissing the action, and that examination involving serious pain or injury to plaintiff's health should not be ordered. This case has been cited with approval in: Western Union Tel. Co. v. Ferguson, (1901) 157 Ind. 64, 60 N. E. 1080; Aspy v. Botkins, (1903) 160 Ind. 170, 66 N. E. 462; Kokomo, etc. Traction Co. v. Walsh, (1915) 58 Ind. App. 182, 108 N. E. 19; Lake Erie etc. R. Co. v. Griswold, (1920) 72 Ind. App. 265, 125 N. E. 783; City of Valparaiso v. Kinney, (1921) 75 Ind. App. 660, 131 N. E. 237.

specifying the time, place, manner, conditions, scope of examination and person or persons to make it. Apparently in Indiana, the court designates the examiner and orders the examination, but could exercise its discretion as to any of the matters set out in the rule.

Rule 35(b).[103] No Indiana statute covers this subject and the cases cited under (a) do not mention it. The general practice in this state is not to divulge the result to the party examined. This section of the Rule seems fair and would appear to be a desirable aid in the accomplishment of the fundamental purposes of the examination.

Rule 36(a).[104] The results under this Rule and Sec. 2-1643, Burns' 1933, are substantially the same, but the procedure differs: the Rule requires a written request to admit, while the statute requires notice of intention to read in evidence. Both require furnishing a copy of the document in

[103] Rule 35. (b) Report of Findings. (1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

[104] Rule 36. Admission of Facts and of Genuineness of Documents. (a) Request for Admission. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

question; the Rule makes a failure to deny within ten days (or further time if allowed by the court on motion) an admission, while under the statute denial may be made by affidavit at any time before the commencement of the trial; the Rule does not permit a request until after the issues are closed, but the procedure may be available under the statute at any time before trial; denial of genuineness under both the Rule and the statute must be under oath, the Rule designating a sworn statement which is the equivalent of the affidavit required by statute.

Rule 36(b).[105] No Indiana statute covers this point, and no cases have been found as to the effect of the admission under Sec. 2-1643, Burns' 1933. In the absence of a rule of this character it probably ought to be held that the admission was an admission against interest for all purposes.

Rule 37(a).[106] The process of obtaining an order for a witness (including a party) to answer after refusal is substantially the same under this Rule and the Indiana statutes.[107] In Indiana, however, the officer reports the fact of

[105] Rule 36. (b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

[106] Rule 37. Refusal to Make Discovery: Consequences. (a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

[107] Sec. 2-1509, second sentence, and Sec. 2-1732.

refusal of a witness to answer; while the Rule provides that this shall be done by the party propounding applying to the court after reasonable notice to all persons affected.[108]

Failure of Witness to Answer Interrogatories under Rule 31: No specific cases have been found in Indiana. The statute for taking depositions by interrogatories is Sec. 2-1532, Burns' 1933, and is part of the statutes on depositions. Thus the fair inference is that the remedy is the same as in the case of oral examination under Sec. 2-1509, Burns' 1933. The foregoing discussion is, therefore, applicable.

Failure of Party to Answer Interrogatories under Rule 33: The statute[109] provides that the court may enforce the answers by attachment or otherwise. Certainly this would permit the court to make an order to answer, as contemplated by the Federal rule; and failure to comply would be contempt under Sec. 4-312, Burns' 1933. The cases recognize a further right, *i. e.,* the striking out of pleadings and defaulting the party, failing to answer, as in the case of an oral examination of party under Sec. 2-1732, Burns' 1933. See discussion under Rule 37(b), *infra.*

Costs: Where it becomes necessary to present to the court the matter of whether a question shall be answered, the Rule provides for taking costs founded on expenses and reasonable fees against the party in court without substantial justification. This does not appear to be covered by Indiana statutes, and no cases have been found involving the matter. It thus appears that the Rule constitutes an innovation in this connection though the question remains as to whether such order might be within the inherent power of the court or within the statutes on costs, particularly Sec. 2-3006, Burns' 1933.

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108 "The officer taking the deposition cannot punish the witness for refusing to testify, but must report the fact to the circuit or superior court of the county, or the judge thereof, who shall order the witness to attend at a specified time and place and submit to the examination or to answer the specific questions which he has refused to answer, as the case may be . . " Watson, Sec. 1192.

109 Sec. 2-1028. See Rule 33, *supra.*

Rule 37(b).[110] (1) *Contempt.* This Rule and the Indiana law are in accord, Sec. 2-1509 and Sec. 2-1732, Burns' 1933, covering the matter specifically, and Sec. 4-312, Burns' 1933, covering the matter generally.

(2). *Other consequences.* This part of the Rule is applicable only to a party or the officer of a party. Generally, the Rule is more extensive than the Indiana law. (i) and (ii) are without statutory counterparts in Indiana. (iii) is recognized in certain instances in Indiana law, but the Rule is more extensive. Stay of proceedings is certainly within the inherent power of the court. The court may dismiss an action for disobedience by the plaintiff of an order concerning the proceedings in the action,[111] and Sec. 2-1732, Burns' 1933,

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[110] Rule 37. (b) Failure to Comply With Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

[111] Sec. 2-901, Cl. 5.

provides for the striking out of a pleading of a party failing to testify conditionally, amounting to a dismissal by the court (and not a default). It is to be noted that the adoption of this Rule by the U. S. Supreme Court makes the same constitutional by implication. (iv) *Arrest:* There is no comparable statute or rule in Indiana.

Rule 37(c).[112] This Rule is not specifically covered in Indiana, but the practice probably could be sustained without error under the apportionment of costs statute [113] except as to the provisions for attorney's fees. It is to be noted that Sec. 2-1644 Burns' 1933, provides for oral proof of the documents if they are not produced; and the Rules are silent on this point.

Rule 37(d).[114] This Rule is broader than the Indiana statute.[115] Under this statute, the striking out of the complaint or other pleading amounts to a dismissal on the court's motion and not a default judgment. The special statute relating to actions involving restraints of trade[116] is in accord with the Rule, permitting default judgments.

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112 Rule 37. (c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

113 Sec. 2-3006.

114 Rule 37. (d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

115 Sec. 2-1732.

116 Sec. 23-121.

Rule 37(e).[117] Indiana does not provide for the issuing of letters rogatory, but it is suggested that such power might well be embraced in new rules.[118]

Rule 37(f).[119] As heretofore pointed out, expenses and attorney's fees are not generally assessable as costs against litigants. If new rules be adopted in this state, a rule similar to this Federal rule should probably be incorporated in them. No cases involving the State of Indiana as a litigant have been found under Sec. 2-1531, Burns' 1933.[120]

VI.

Rule 38(a).[121] A similar rule in Indiana when read in connection with Rule 38(b) and Rule 39(a) would not change the law because certainly the word "statute" is used in the sense of a "valid statute." Clearly there are limitations upon the power of a legislature to impose a jury trial upon the courts,[122] and it would not be the purpose of such a rule to approve in advance any legislation upon the subject. In this connection it is suggested that it might be wise to consider the advisability of some modification of Sec. 2-1204, Burns' 1933. Under this statute, for example, it has been held that a defendant in disbarment proceedings is entitled to a jury trial.[123] Certainly there is no constitutional right to a jury trial in this case[124] and the results are undesirable.

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117 Rule 37. (e) Failure to Respond to Letters Rogatory. A subpoena may be issued as provided in the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U. S. C., Title 28, § 711, under the circumstances and conditions therein stated.

118 Letters rogatory are a written request of a court or judge to a court or judge in another jurisdiction to take the testimony of a witness.

119 Rule 37. (f) Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

120 See, Rule 30 (g) *supra.*

121 Rule 38. Jury Trial of Right. (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

122 See, for example, Brown v. Circuit Judge, (1869) 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 A. S. R. 438 (The Legislature may not impose a jury trial on the courts in equitable proceedings); Carter v. Commonwealth, (1899) 95 Va. 791, 32 S. E. 780 (*semble* as to contempt).

123 In re Darrow, (1910) 175 Ind. 44, 92 N. E. 369.

124 Willis, *Constitutional Law,* (1936) p. 553, n. 248.

Rule 38(b),[125] (c),[126] and (d).[127] There is no statute in Indiana on the subject-matter of these rules. It has been held that a local court rule of this sort is invalid,[128] but there seems to be no good reason to doubt the validity of a Supreme Court rule on the subject.[129] The Rule, of course, is designed to avoid the delay which so frequently arises when a demand for a jury trial may be made at any time up to trial. It is interesting to note that for the year 1936 in the circuit and superior courts of Indiana outside of Marion County only 864 cases were tried by jury as against 17,355 tried by the court.[130]

Rule 39(a)[131] and (b).[132] Apart from the modification

[125] Rule 38. (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

[126] Rule 38. (c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

[127] Rule 38. (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[128] See, Graves v. State, (1931) 203 Ind. 1, 178 N. E. 233.

[129] The authorities sustain the general proposition that a reasonable regulation on this point is valid. See, 16 R. C. L. pp. 198-9.

[130] Second Annual Report Indiana Judicial Council, 1937, p. 92.

[131] Rule 39. Trial by Jury or by the Court. (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

[132] Rule 39. (b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

which Rule 38(b), (c), and (d) would make as to the time and manner of a demand for a jury trial this rule states the Indiana practice,[133] as it must be assumed that the judge would have authority to order a jury trial even though the procedure for demand had not been followed.

The formal waiver of jury trial provided for in Rule 39(a) is similar to that provided for in Sec. 2-1904, Burns' 1933. This Rule would permit both parties to retract a prior demand for a jury trial. The requirements of Rule 38, therefore, could not fairly be said to impose any undue hardship on the parties.

Rule 39(c).[134] Sec. 2-1204, Burns' 1933, states the substance of the first half of this rule.[135] As to the second half there is no statute covering this point, but there seems to be no difficulty under the Indiana practice in allowing parties and the court to agree to the submission of a case to a jury upon the basis stated in the Rule.[136]

Rule 40.[137] Indiana statutes[138] give the trial courts almost unlimited authority over this subject-matter. Under previous statutes criminal cases were expressly given preference.[139]

133 Sec. 2-1903, Burns' 1933, provides for the separation of jury and court cases on the docket. Indiana practice assumes that this statute is directory and that the trial court has a wide discretion in the assignment of cases for trial. The common practice is in accord with this Rule.

134 Rule 39. (c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

135 See, Ketcham v. Brazil Block Coal Co., (1883) 88 Ind. 515.

136 The only objection would be the constitutional right to have an equity case decided by the judge which certainly the parties may waive if they may waive the constitutional right to a jury trial.

137 Rule 40. Assignment of Cases for Trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

138 Sec. 2-1101; 2-1106; 2-1902-3; 2-2019.

139 See, State v. Kahn, (1900) 154 Ind. 450, 57 N. E. 106.

The present statute[140] does this by implication, and there is a similar implication as to all jury trials. I find no other preference stated in the present Indiana statutes except in *habeas corpus* proceedings.[141]

Rule 41(a).[142] This rule limits the absolute privilege of dismissal to a time prior to service of an answer and would materially change the Indiana law set out in Sec. 2-901-2, Burns' 1933. The Indiana law on this point has gone far beyond that of most states and can fairly be said to be too liberal in allowing a voluntary dismissal. Sec. 2-1021, Burns' 1933, does provide, as this rule does, that the dismissal of an action shall not operate as a dismissal of a counter-claim.

Rule 41(b).[143] Sec. 2-901, Burns' 1933 states the substance of the first sentence of this rule. The last sentence of

140 Sec. 2-1903.

141 Sec. 3-1917.

142 Rule 41. Dismissal of Actions. (a) Voluntary Dismissal: Effect Thereof. (1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

143 Rule 41. (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

this Rule would change the statute, which latter provides that the dismissal is without prejudice. The second sentence would make available to a defendant, in addition to the motion to direct a verdict and the motion to find against the plaintiff, a motion to dismiss, raising the same question. In a jury case undoubtedly this would be an addition to the Indiana practice.[144] The third sentence, it is believed, would not change the law on this last point because certainly the ruling on such a motion would be the equivalent of a directed verdict or finding and would be therefore on the merits.

Rule 41(c).[145] No statute covers the subject-matter of the first sentence. The cases, however, hold that the statute as to the dismissal of a complaint apply to cross-complaints and counterclaims.[145a] The second sentence is a necessary corollary of Sub-section (a) and to the same extent would change the Indiana law on this point.

Rule 41(d).[146] There is no statute covering this point, but such a rule is common in the local rules.

Rule 42(a)[147] and (b).[148] While there is no general

144 See, Engrer v. Ohio & Miss. Ry., (1895) 142 Ind. 618, 42 N. E. 217.

145 Rule 41. (c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

145a Mitchell v. Friedley, (1891) 126 Ind. 545, 26 N. E. 391.

146 Rule 41. (d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

147 Fule 42. Consolidation; Separate Trials. (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

148 Rule 42. (b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

statute expressly authorizing the consolidation of issues for trial the procedure has been upheld.[149] Sec. 2-303; 2-1204 make provisions similar to the Rule for the separation of issues for trial.

Rule 43(a).[150] This rule is designed to repudiate the taking of evidence by affidavit and deposition and proof by verified pleadings in equity practice, which still prevails to a large extent in the Federal practice.[151] The balance of Rule 43(a) seeks to clarify the confusion which has existed in the Federal District Courts, and it is therefore inapplicable to the Indiana situation. It is to be noted that this Federal Rule incorporates the statutes and law of Indiana on this subject into the Federal practice in this state. Such incorporation necessarily includes all of the rules of evidence contained in the decisions of the Supreme and Appellate Courts of Indiana, and also a number of pertinent statutes. Any desirable revisions as to those will have to be made by state rule.

Rule 43(b).[152] The corresponding Indiana statutes are Secs. 2-1726-7. The Indiana rule as to leading questions has

149 See, Atkinson v. Disher, (1912) 177 Ind. 665, 98 N. E. 807. Sec. 43-706 provides for consolidation of suits for foreclosure of mechanic's liens.

150 Rule 43. Evidence. (a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

151 See, Rule 11 *supra.*

152 Rule 43. (b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

been stated as follows: ". . . Leading questions may also be asked of a young and inexperienced witness, or an unwilling witness, or one that is evidently hostile to the party examining him, or in any case when the facts cannot be elicited except by a question that is leading. . . . When and under what circumstances a leading question may be asked is a matter very much in the discretion of the trial court, and a judgment will seldom, if ever, be reversed for permitting or refusing such questions."[153] On the subject of scope and manner of cross-examination, the same writer says: ". . . Subject to a few exceptions, it is a general rule that questions on cross-examination must be limited to the subject-matter inquired about in the direct examination. . . . Leading questions may be asked on cross examination . . ."[153a]

From the foregoing, it thus appears that: (a) Under both the Rule and Indiana law, a party may interrogate any unwilling or hostile witness by leading questions; (b) The Rule is perhaps broader in the matter of making an adverse party (or the officer, etc., of a corporate adverse party) a hostile witness; while, on the other hand, the Indiana law is apparently broader than the Rule in clothing the trial court with discretion; (c) The Rule and Indiana law are the same, substantially, on the matter of scope of cross-examination. The Rule does not specifically recognize the right of leading questions on cross-examination; but, considering the discretion with which Federal courts are vested in such matters, it is suggested that the Rule is the same.

Rule 43(c).[154] Under this Rule, an offer to prove may be

153 Watson, Sec. 1487.

153a *Ibid.* Sec. 1488.

154 Rule 43. (c) Record of Excluded Evidence.—In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

made after an objection is sustained. This is contrary to Indiana law on the subject, the rule of which is concisely stated and criticized by Watson.[155] The balance of the Rule (when read in connection with later Rules providing for a stenographic report of a trial) would not depart materially from the present Indiana practice.

Rule 43(d).[156] This is in accord with the provision of Sec. 2-4701.

Rule 43(e).[157] In general the law of Indiana requires that motions based on facts outside the record must be verified or supported by affidavit or other proof.[158] No case has been found wherein the matter of oral evidence on a motion involving facts outside the record was in issue. There seems no reason to believe that a trial court could not hear oral evidence on a motion. Insofar as Rule 7(b), for example, substitutes a motion for a plea in abatement certainly that result would follow.

Rule 44(a).[159] This Rule is a desirable simplification of

155 Sec. 1444.

156 Rule 43. (d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

157 Rule 43. (e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

158 Watson, Sec. 853; McDonel v. State, (1883) 90 Ind. 320; Blemel *et al.* v. Shattuck *et al.*, (1892) 133 Ind. 498, 33 N. E. 277.

159 Rule 44. Proof of Official Record. (a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

the Federal practice, and in Indiana would supersede[160] a number of statutes.[161] The Rule adopts in general (so far as statutes are concerned) the provision of the Uniform Law, making an official publication evidence without certification.

As to other records, proof is made by an attested copy made by the officer having custody of the record, together with a certificate made by a judge of a court of record or other public official in that district having a seal that the first officer does have custody of the record in question. This would simplify the requirements of the Indiana statutes on that score. No Indiana statute makes the express provision of the last sentence, and this would enlarge the provision of Sec. 2-1616 as modified by Sec. 2-1646 (except as to foreign statutes, where again an official publication is *prima facie* proof.)

Rule 44(b).[162] No similar law has been found in Indiana statutes or decisions, nor have any Indiana cases been found which would prevent the proof of the absence of a record by the certificate (rather than the oral evidence) of a Recorder or other officer or other person competent to make examination, based on an examination of the record.

Rule 44(c).[163] This would preserve all of the statutes mentioned above.[164]

Rule 45(a).[165] The Rule is more specific as to the contents of the subpoena (*i. e.* "shall command each person to whom

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160 But see sub-section (c) *infra.*

161 Sec. 2-1605-14; 2-1617; 2-1632-34; 2-1636; 2-1646 (Uniform Proof of Foreign Laws Acts); 2-4801-5 (Uniform Judicial Notice Act).

162 Rule 44. (b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

163 Rule 44. (c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

164 See note 161 *supra.*

165 Rule 45. Subpoena. (a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall

it is directed," etc.) than the statute.[166] The statute does not provide for the clerk issuing blank subpoenas to a party but this is the practice. As to a subpoena for documentary evidence, see the comment under Rule 45(b), *infra.*

Rule 45(b).[167] The general practice of subpoenaing a witness, to bring with him stipulated papers, documents, etc., is well established in Indiana. A subpoena *duces tecum,* however, is not the proper practice to require a party to produce books, etc., this being taken care of by statute.[168] In substance the results are the same because of the latter part of this Rule. No cases have been found in Indiana involving the power of a court to force payment of expenses or quash a subpoena *duces tecum* for oppressiveness, but it is suggested that such an order in a proper case would not be reversible error.

Rule 45(c).[169] This Rule and the Indiana statute[170] are similar in allowing one not an officer to serve a subpoena. The Rule departs from the statute in placing an eighteen-year age requirement in the matter and in prohibiting a party

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state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

166 Sec. 2-1701.

167 Rule 45. (b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

168 Sec. 2-1644. Watson, Sec. 1290; Duke v. Brown, (1862) 18 Ind. 111, 113.

169 Rule 45. (c) Service. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

170 Sec. 2-1701.

serving the subpoena. Sec. 2-1702 creates another method of service, *i. e.* by leaving a copy, and this is not provided for by the Rule. The Rule requires the tendering of fees and mileage for one day. This is not necessary under Indiana statutes, except as to witnesses from out of the county.[171] No comparative law exists in Indiana on the matter of fees not to be tendered when the state is a party.

Rule 45(d).[172] This Rule would change the Indiana practice where under Sec. 2-1509 the officer taking the deposition is empowered to summon and compel attendance of witnesses rather than the clerk. As to the production of documentary evidence only by an order of the court, see discussion under Rules 34, 45(b) *supra.*

(2) In general the Indiana statute[173] is in accord providing that the deposition must be taken in the county of the residence of the witness. Apparently the same result follows under the statute as to a party examination.[174] The Rule, however, empowers the court to fix any place for the taking of a deposition. This would be an innovation and contrary to the Indiana statutes referred to above.

Rule 45(e).[175] The issuance of subpoenas is similar under this Rule and Sec. 2-1701. Although Indiana contemplates

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171 Sec. 2-1707.

172 Rule 45. (d) Subpoena for Taking Depositions; Place of Examination. (1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

173 Sec. 2-1507.

174 Sec. 2-1729.

175 Rule 45. (e) Subpoena for a Hearing or Trial. (1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held.

one subpoena for all witnesses,[176] it is common practice that as many issue as are requested. The Rule provides that witnesses need not go more than 100 miles and under Federal jurisdiction a witness from another state within the 100 mile limit may be compelled to attend. The comparative Indiana law is to the effect that witnesses need not go farther than the adjoining county.[177] The Rule recognizes Federal statutes under which the court may order a subpoena served anywhere. No similar rule exists in Indiana.

(2) The statute referred to is the one providing for a subpoena against an American citizen abroad. No similar Indiana statute exists.

Rule 45(f).[178] Under Sec. 4-312 Indiana courts may punish for contempt, and they thus have the same power given by this Rule.

Rule 46.[179] In abolishing the exception, this Rule would change the Indiana law,[180] but it is a change upon which there has been substantial agreement. The balance of the

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A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U. S. C., Title 28, §§ 711, 713.

176 Sec. 2-1704.

177 This results from an interpretation of Sec. 2-1506 and Sec. 2-1704, 6-9. See, Alexander v. Harrison, (1891) 2 Ind. App. 47, 28 N. E. 119.

178 Rule 45. (f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed in contempt of the court from which the subpoena issued.

179 Rule 46. Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

180 See, Sec. 2-2009-10; 2-3101-2; 2-2401 (8th).

rule requiring specific objection unless no opportunity existed to make one is in accord with the Indiana practice.[181]

Rule 47(a).[182] No statute prescribes the prevailing Indiana practice of the judge taking no part in the examination of prospective jurors. This Rule leaves the matter within the discretion of the court. It is undoubtedly true that an Indiana trial court might under existing law assume the burden of examining prospective jurors or require an investigation prior to trial. Such was the Common Law procedure and a party has no constitutional right to another procedure.[183] Indiana cases sustain the proposition that the judge may limit the *voir dire* examination.[184] This Rule therefore would not change the Indiana law on the subject, although it might encourage some trial judges to assume a larger control of the *voir dire* examination than is now customary.

Rule 47(b).[185] Chapter 295, Acts 1937, p. 1347, is substantially in accord with this Rule. The statute however provides that the alternate jurors shall not be released until

181 See, Lewis v. Nielson, (1911) 176 Ind. 414, 96 N. E. 145.

182 Rule 47. Jurors. (a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

183 Pointer v. U. S., (1894) 151 U. S. 396.

184 See, Saraceno v. State, (1933) 202 Ind. 663, 177 N. E. 436.

185 Rule 47. (b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

after verdict, and that the one who is to serve is chosen by lot and in those particulars differs from the Rule.

Rule 48.[186] Sec. 2-2001, Burns' 1933 states a similar rule as to the number of jurors, although it fixes a minimum of three and the Rule fixes no minimum. No statute provides for an agreement as to a majority verdict, but in view of the fact that parties may waive a jury trial in its entirety it would follow that without a statute an agreement as to a majority verdict ought to be valid.

Rule 49(a).[187] The adoption of this Rule would supersede Sec. 2-2022, Burns' 1933, requiring a general verdict in all cases, but it would restore the practice in this state to the Common Law procedure on the point and as the practice existed prior to the enactment of the above statute in 1897.[188] It is to be noted, of course, that the Rule does not require a special verdict in every case, but puts the choice of a special or general verdict within the discretion of the judge.

Rule 49(b).[189] This states in substance the provisions of Sec. 2-2022-3, Burns' 1933, except that the Indiana statutes

[186] Rule 48. Juries of Less than Twelve—Majority Verdict. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

[187] Rule 49. Special Verdicts and Interrogatories. (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

[188] See, Sec. 2-2021, Burns' 1933 and Sec. 555, Burns' 1894.

[189] Rule 49. (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such

require the submission of interrogatories if asked for by the parties, whereas the Rule puts the matter within the discretion of the judge. The Rule further gives the judge express authority to refuse to receive a verdict inconsistent with answers to interrogatories, or answers which are inconsistent with each other, or grant a new trial because of those situations. It is clear that under the present Indiana law a judge may refuse to accept a defective verdict or a verdict inconsistent with answers to interrogatories, but ought not to grant a new trial for those reasons.[190] So far as the Rule permits the granting of a new trial on motion of the judge[191] and prohibits the entry of a judgment on the general verdict where answers nullify each other because inconsistent with each other it would change the Indiana law.

Rule 50(a).[192] The first two sentences in general state the

explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

190 Bosseker v. Cramer, (1862) 18 Ind. 44 (proper procedure is motion for *venire de novo*); Baughan v. Baughan, (1887) 114 Ind. 73, 17 N. E. 181 (*ibid*); Bowman v. Phillips, (1874) 47 Ind. 341; Chicago, T. H. etc. R. v. Collins, (1924) 82 Ind. App. 41, 142 N. E. 634, 143 N. E. 712. After all, however, there seems to be no reason why under existing Indiana law a trial court could not properly order a new trial on its own motion before final judgment and the end of the term.

191 Sec. 2-2023, Burns' 1933 requires a judgment on the general verdict unless the answers are completely irreconcilable. The verdict is incomplete, however, until recorded so that this statute does not prohibit the refusal by the judge of an acceptance of such a verdict and answers.

192 Rule 50. Motion for a Directed Verdict. (a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not

Indiana law on this subject.[193] If the case last cited requires affirmative action to prevent a waiver of jury trial, the Rule would apparently abolish that requirement. The Rule would not change the present Indiana rule requiring that a defendant who makes a motion at the close of the plaintiff's evidence which is overruled renew the motion at the close of all the evidence to preserve a question for review.[194] The last sentence states a rule not found in the Indiana statutes, but one frequently found in the local rules.

Rule 50(b).[195] This Rule states a procedure not found in the Indiana practice, but one which is commonly accepted as desirable. The Rule obviates the necessity of a new trial in some instances where the judge changes his mind as to the correctness of his ruling on a motion to direct a verdict. The last sentence would repudiate the Indiana statutes and cases to the effect that in no event may the court enter a judgment except in accordance with a verdict.[196] It is to be noted that the court is given power to grant a new trial in any event to

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granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

193 See, Michigan Central R. v. Spindler, (1937) (Ind.) 5 N. E. (2d) 632, 12 Ind. L. J. 329.

194 See, Illinois Surety Co. v. State, (1913) 55 Ind. App. 31, 103 N. E. 363.

195 Rule 50. (b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

196 See, Sec. 2-2501-2; Engrer v. Ohio & Miss. Ry. Co., (1895) 142 Ind. 618, 42 N.E. 217.

take care of the cases where it might fairly be said that one would be justified.

Rule 51.[197] The Rule does not require the Court's instructions to be in writing. This Rule would materially change the Indiana law under which a party may require the court to give its own instructions in writing and indicate what they will be prior to the argument and secure a review of rulings on instructions given or refused.[198] Again, however, there is common agreement upon the proposition that it is essentially unfair for a party to sit by and make no specific objection to erroneous instructions. In all other instances in Indiana procedure unless specific objection is made prior to an erroneous ruling the party waives the objection, and there is no good reason why this Rule should not be extended to the giving of instructions. Rule 51 modifies the existing Federal practice in that it permits a party to submit written instructions and provides that the objections to instructions shall be out of the hearing of the jury.

Rule 52(a).[199] This Rule would materially alter the Indiana practice where under Sec. 2-2101-2, Burns' 1933

197 Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

198 Sec. 2-2008-11, Burns' 1933.

199 Rule 52. Findings by the Court. (a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

findings of facts and conclusions of law are required only when requested in writing by the parties before the trial.

Rule 52(b).[200] The first sentence would materially alter the Indiana practice where no express provision is made for the amendment of findings and of an existing judgment based upon them.[201] The second sentence allows a motion for a new trial as an alternative remedy in any event. A new trial for insufficient findings (as distinguished from findings not supported by the evidence) would be an innovation in the Indiana practice, where a failure to find definitely on a point is a finding against the party having the burden of proof. The third sentence contemplates a proper motion by a party to amend or to test the sufficiency of the evidence to support a finding, and this likewise would constitute an innovation.[202] It provides, however, that the decision and judgment may be reviewed on the merits without such previous action. This is in keeping with the Federal practice where a motion for new trial is not a necessary step toward appellate review, and to that extent is contrary to the Indiana practice on that score.

Rule 53 (a)[203] (b)[204] (c)[205] (d)[206] and (e).[207] Secs. 2-1204; 2-2301-3; 4-309; 4-3401-7, Burns' 1933 provide for

200 Rule 52. (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

201 Indiana cases hold that a finding may be amended or modified before judgment only. Dowell v. Talbott Pav. Co., (1894) 138 Ind. 675, 38 N. E. 389.

202 The first is improper (Chicago, etc. R. v. State, (1902) 159 Ind. 237, 64 N. E. 860), and the latter must be raised by a motion for a new trial. (Sec. 2-2401, Cl. 6.)

203 Rule 53. Masters. (a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject

matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

[204] Rule 53. (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

[205] Rule 53. (c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury.

[206] Rule 53. (d) Proceedings. (1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the

the appointment of a master or referee, but this procedure is little followed. The Rule makes desirable detailed provision upon this subject and would seem to constitute a desirable addition to and substitution for the Indiana provisions upon the subject.

VII.

Rule 54(a).[208] This Rule would not change the Indiana law. The first sentence is a definition of "judgment" as used in the Rules. A similar rule in Indiana would refer to all final

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form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

[207] Rule 53. (e) Report. (1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

[208] Rule 54. Judgments; Costs. (a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

judgments and interlocutory orders from which an appeal will lie.[209]

Rule 54(b).[210] Indiana statutes [211] make various provisions for separate judgments. The Rule as stated would seem to be somewhat broader in some respects and narrower in some respects than the statutes. On the latter score, the statutes, for example, deal with the effect of a separate judgment and the Rule does not, so that those provisions of the statutes might well be saved. The second sentence in the light of the statutes on appeal might in some cases enlarge the right of appeal in the light of the cases in this state prohibiting an appeal until all of the issues in a case have been disposed of.[212] In view of the fact that the first sentence requires a disposal of all issues having a factual connection, this enlargement would seem to be desirable in view of the previous rules which make unlimited provision for joinder of actions and counterclaims. If the matters joined have no necessary connection wtih each other and are tried separately, there appears to be no good reason why an appeal should not be allowed from each matter as it is disposed of.

Rule 54(c).[213] Secs. 2-1057; 2-1071, Burns' 1933 state the substance of this Rule.

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209 See, Rules 72, 73, *infra* where reference is made to the Indiana statutes on this point.

210 Rule 54. (b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

211 Secs. 2-809-12; 2-2504-7; 2-2514; 3-2503.

212 See, *e. g.,* Wisconsin Lbr. Co. v. Wall, (1926) 84 Ind. App. 642, 151 N. E. 830.

213 Rule 54. (c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 54(d).[214] Sec. 2-3001, Burns' 1933 states the substance of this Rule. A large number of statutes deal with the subject of costs in specific instances and the Rule exempts such statutes from its operation. No statute makes provision for the procedure on the re-taxing of costs, but the Indiana practice is in general in accord with the provision of the Rule on this point, except for the time limit of five days.

Rule 55(a).[215] This Rule would alter the Indiana practice simply to the extent that it gives the clerk power to enter a default, whereas under the Indiana practice the default must be entered by the court.

Rule 55(b)(1).[216] This Rule would alter the Indiana practice to the same extent as 55(a).

Rule 55(b)(2).[217] This would alter the Indiana practice (under Sec. 2-2511) to the extent that it provides for notice to the defaulted party if he has appeared.

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214 Rule 54. (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

215 Rule 55. Default. (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

216 Rule 55. (b) Judgment. Judgment by default may be entered as follows: (1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

217 Rule 55 (b). (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to

Under the Indiana statutes if the defendant has been served personally a default confesses liability except as to amount except in the case where a plaintiff has sued on a verified account.[218] If he has been served constructively, the default does not confess liability and the complaint must be proved.[219]

This Rule makes no distinction between those situations, but allows the court in any case to require proof as to damages or other allegations.

It is believed that the Indiana law now protects an infant or incompetent defendant to the same extent as does this Rule.[220]

Rule 55(c).[221] No statute in Indiana provides for the setting aside of a default where no judgment has been rendered, but in view of the fact that the matter would still be pending under accepted law in Indiana the court would certainly have power to set aside a default for good cause shown.[222] The grounds for setting aside a default judgment are set out in Rule 60 (b) and the extent to which the Federal rule would change the Indiana law on this subject is discussed at that point.

Rule 55(d).[223] This is simply a necessary corollary of the preceding Rules.

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carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

218 Sec. 2-1055.

219 Sec. 2-1509.

220 See, Sec. 2-209, 2-803; Martin v. Starr, (1855) 7 Ind. 224.

221 Rule 55. (c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

222 Previous law made the provision similar to this Rule. See, Shoaff v. Jones, (1849) 1 Ind. 564. Under the general rule that a court has jurisdiction to modify or vacate any order made until the expiration of the term during which final judgment is rendered, it would follow that a default might properly be set aside. Sec. 4-321, Burns '33; Sauer v. Sauer, (1921) 77 Ind. App. 22, 133 N. E. 169.

223 Rule 55. (d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default

Rule 55(e).[224] There is no similar rule in Indiana as to actions against the state, but a rule of this character would seem to be desirable.

Rule 56 (a)[225] (b)[226] (c)[227] (d)[228] (e)[229] (f)[230] and

is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

[224] Rule 55. (e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

[225] Rule 56. Summary Judgment. (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

[226] Rule 56. (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

[227] Rule 56. (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[228] Rule 56. (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

[229] Rule 56. (e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

[230] Rule 56. (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons

(g).[231] There is no Indiana statute providing for a summary judgment, but it is a desirable procedure upon which there has been more or less uniform agreement.[232] The Federal Rule on this subject has been drafted in the light of statutes and experience in England and states in this country and is undoubtedly the result of careful consideration of the problem involved. Earlier statutes on this subject limited the summary judgment to claims based upon written contracts and similar situations, but it will be noted that the Federal Rule provides for a summary judgment in any type of case. It would be particularly desirable, for example, in an ejectment case, and there seems to be no good reason why it should be restricted to the so-called contract cases.

It will be noted, too, that the procedure is available to a defendant as well as a plaintiff on all aspects of the case.

Rule 57.[233] A similar rule in Indiana would preserve the Declaratory Judgments Act. (Sec. 3-1101-16.) The second sentence if adopted in this state might constitute a repudiation of what the Supreme Court of Indiana said in the case of Brindley v. Meara, (1935) 209 Ind. 144, 198 N. E. 301, which it will be recalled was criticized by Professor Borchard,

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stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

231 Rule 56. (g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

232 See, Report Indiana Committee on Governmental Economy, p. 316; First Annual Report Indiana Judicial Council, p. 13.

233 Rule 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

author of the Act in 11 Ind. Law Journal 376 (1936). The last sentence of this section is simply a specific reiteration of prior rules conceding to the court complete discretion over the trial calendar.

Rule 58.[234] This Rule would change the Indiana law in so far as it provides for an immediate judgment upon a verdict which is to be entered by the clerk rather than by the judge. In substance the Rule also requires in all cases an immediate judgment. The judge is to settle the form of the judgment for entry by the clerk if the judgment is other than an obvious one. The last sentence fixes the time of the judgment as of the date of its notation in the civil docket. This would modify the Indiana law under which a judgment is effective as of the date of its announcement by the judge,[235] and would seem to be a desirable specific rule governing preferences and time for appeal.

Rule 59(a).[236] A similar rule in Indiana would preserve the present statute on a motion for new trial provided (1)

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234 Rule 58. Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

235 See, Jaqua v. Harkins, (1907) 40 Ind. App. 639, 82 N. E. 920; Caldwell v. Teaney, (1927) 199 Ind. 634, 157 N. E. 51.

236 Rule 59. New Trials. (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

was not limited to jury cases, as of course (2) is peculiar to the present Federal system, and the Indiana new trial statute covers both jury and court cases. It is believed that the power granted to allow a new trial as to part would not alter the Indiana law where this power is largely within the discretion of the court.[237] The last sentence preserves the power granted in Rule 52 to amend findings of fact and conclusions of law and as suggested in that connection would alter the Indiana law.

Rule 59(b).[238] This Rule would modify the Indiana statute (Sec. 2-2403) which allows thirty days for the filing of a motion for a new trial after verdict or finding. The Rule provides that the motion shall be filed within ten days after the entry of judgment but in the light of the previous rules which provide for the immediate entry of the judgment after verdict or finding the Rule simply cuts the time for the filing of a motion from thirty to ten days. It, however, extends the time if the ground for the motion is newly discovered evidence to the ninety-day period allowed for an appeal. The Rule would supersede Sec. 2-2405 which however can very seldom be used.

Rule 59(c).[239] The first sentence is in accord with the Indiana statute. The second and third sentences would change the Indiana law under which counter-affidavits are permitted, only to the extent that it fixes a time for their filing.[240]

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237 See, Kessans v. Kessans, (1915) 58 Ind. App. 437, 108 N.E. 380.

238 Rule 59. (b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

239 Rule 59. (c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

240 Bingham v. Walk, (1891) 128 Ind. 164, 27 N. E. 483.

Rule 59(d).[241] No Indiana statute states this Rule, but it must be conceded that a trial court would have power to grant a new trial any time within the term on its own motion.[242] The Rule on this score limits (or extends) the time for the granting of such a motion to ten days which would seem to be a desirable innovation particularly where the judgment was rendered less than ten days before the end of the term.

Rule 60(a).[243] No Indiana statute states this Rule, but it has always been held that courts may correct clerical mistakes by a *nunc pro tunc* entry. On the face of it this Rule might remove some of the restrictions in this field as to the manner of proof of the mistake.[244] There seems to be no good reason why there should be any restrictions on the manner of proof.

Rule 60(b).[245] The language of the first sentence of this Rule is identical with the Indiana statute on this score.[246] The second sentence would alter the Indiana procedure changing the form from an independent action to a motion and

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241 Rule 59. (d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

242 See annotation to Rule 55 (c) *supra.*

243 Rule 60. Relief from Judgment or Order. (a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

244 See, Boyd v. Schott, (1899) 152 Ind. 161, 52 N. E. 752; *cf.* In re Saric, (1925) 197 Ind. 1, 149 N. E. 434.

245 Rule 60. (b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

246 Sec. 2-1068, Burns '33.

reducing the time from two years to six months. The third sentence would not change the Indiana law on that point. The fourth sentence (1) preserves the equitable proceeding to set aside a judgment induced by mistake or fraud, and if it can fairly be said that Sec. 2-1068, Burns' 1933 does not supersede completely the equitable law upon this subject[247] this provision would not change the Indiana law on the subject. A rule similar to (2) would preserve the Indiana statutes[248] providing for the setting aside of a judgment based upon service by publication. The Indiana statutes, however, apparently do not go as far as the Federal statutes on this point because this Rule allows a defendant "not actually personally notified" to set aside a judgment within one year and would therefore include the case where substituted personal service was had, without actual notice to the defendant. An extension of the Indiana law on the latter point might be desirable and restricting the privilege to one year would therefore include the case where substituted personal service was had, without actual notice to the defendant. An extension of the Indiana law on the latter point might be desirable and restricting the privilege to one year rather than two, three, or five years might be desirable.

Rule 61.[249] Secs. 2-1071, 2-1013, 2-1009, Burns' 1933 state the substance of this Rule.

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247 See, Cory v. Howard, (1929) 88 Ind. App. 503, 164 N. E. 639, which holds that the statute is not exclusive and that an equitable suit to set aside a judgment induced by fraud is still an available remedy. See also, Glansman v. Ledbetter, (1921) 190 Ind. 505, 130 N. E. 230, which holds that a judgment which is void (not voidable) because induced by fraud in the service of notice may be attacked collaterally.

248 Sec. 2-1058; 3-1224; 2-2601-3; 3-1403.

249 Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62(a).[250] This would modify the Indiana law which contemplates a right to an immediate enforcement of a judgment or decree.[251] There is no good reason to believe, however, that the trial court in Indiana would not have the power to stay the enforcement of a judgment or decree.[252]

Rule 62(b).[253] What was said under (a) above is applicable here.

Rule 62(c).[254] One appealing in an interlocutory injunction proceeding must file a bond,[255] and the filing of a bond stays

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250 Rule 62. Stay of Proceedings to Enforce a Judgment. (a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

251 Sec. 2-3301-17.

252 Sec. 2-3401-13, make express provision for stay of execution, but the statutes could well be construed not to be exclusive. See, *e. g.*, Eberwine v. The State, *ex rel.* Koster, (1881), 79 Ind. 266. See also, Sec. 3-2110, which provides for proceedings to stay execution.

253 Rule 62. (b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

254 Rule 62. (c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

255 Sec. 2-3219.

the enforcement but not the effectiveness of the injunction.[256] The trial court still has jurisdiction of the case and there would seem to be no reason why it might not properly do what this Rule authorizes it to do in cases where the appeal is from an interlocutory order, because the Rule limits the power granted to the time "when" the appeal is taken.[257]

If an appeal from a final judgment were involved and the appeal be taken during term again there would seem to be no objection to such a procedure under existing Indiana law.[258] If the appeal was taken after the term when the final judgment was rendered, this Rule probably would change the Indiana law,[259] where it has been consistently held that statutory authority must be found for the modification of a final judgment after the term expires at which it was rendered.[260]

Rule 62(g) gives the court of appeals a similar power over this subject matter.

The last sentence of this Rule deals with a situation peculiar to the Federal practice.

Rule 62(d).[261] Under Rule 73(a) an appeal "is taken" by the filing of a notice of appeal.[262] Under this Rule and Rule 73 provision is made for two types of bond, and the terminology varies from the Indiana statutes, but the substantial results are the same. In these Rules an "appeal bond" is a bond given to secure costs on appeal. A bond to stay enforcement of the judgment is designated as a "supersedeas bond" whether it be given in the court below or in the Court

256 Sec. 2-3220; Hawkins v. State, (1890) 126 Ind. 294, 26 N.E. 43.

257 See the annotations to Rule 55 (c) *supra.*

258 *Ibid.*

259 See, In re Perry, (1925) 83 Ind. App. 456, 148 N. E. 163; 20 Ill. L. Rev. 496.

260 The recent case of Penn v. Ducomb, (1938) (Ind.) 12 N. E. (2d) 116 holds that the propriety of such action may be waived by failure to object, but this does not impair the validity of the general proposition.

261 Rule 62. (d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

262 Rule 73 (c).

of Appeals. This Rule permits the trial court to take a stay bond and Rule 73(d) permits the Court of Appeals to take a stay bond, and in either case the Rules describe the bond as a "supersedeas" bond. Under Indiana practice the trial court may approve a stay bond, but it is designated an "appeal bond", whereas one given after the appeal is perfected and which is approved by the courts of appeal is designated as a supersedeas bond.[263]

This Rule allows the trial court to approve a stay bond until it would lose jurisdiction by the filing of the record in the Court of Appeals under Rule 73(g).[264] This normally must be done within 40 days after notice of appeal, which latter must be within ninety days after judgment,[265] this latter time being extended until the disposition of a pending motion for new trial or petition for rehearing.[266]

This Rule would allow the trial court to approve a stay bond up to 130 days after final judgment, or the ruling on a motion for new trial regardless of the expiration of the term, whereas under existing practice in Indiana the trial court may approve an appeal bond only during the term at which final judgment is rendered or a motion for new trial overruled, or during a time beyond that term designated by the court.[267]

Rule 62(e).[268] Sec. 2-4716, Burns' 1933 are similar to this Rule if a municipal, county or township corporation or their representative is involved. I find no statute exempting the State or state officials from the giving of a bond. Indiana

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263 Sec. 2-3204, 8; Rule 28, Indiana Supreme Court.

264 8 Hughes, Fed. Practice (1931) Sec. 5439 (this is as to an appeal to the Supreme Court, but the same result would follow if an appeal to the Circuit Court of Appeals were involved).

265 Rule 73 (a); Sec. 230, Vol. 28 U. S. C. A.

266 8 Hughes, Federal Practice (1931) Sec. 5698.

267 Sec. 2-3204; 2-3208; 2-3219; Plotnicki v. Nowicki, (1920) 73 Ind. App. 383, 127 N. E. 564.

268 Rule 62. (e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

statutes likewise exempt executors, administrators and guardians.[269]

Rule 62(f).[270] A similar state rule would continue the statutes as to stay of execution.[271]

Rule 62(g).[272] A similar rule in Indiana would continue the statutes and Supreme Court Rules[273] on this same subject matter.

Rule 63.[274] This Rule states the substance of the Indiana practice in so far as a regular succeeding judge is concerned.[275] No Indiana statute expressly allows a special judge to be assigned to dispose of a case previously tried by another judge who becomes disabled. The cases on the subject are in confusion, but there is some authority for the appointment of a special judge for this purpose, or the resumption of

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269 Sec. 2-3217.

270 Rule 62. (f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

271 Sec. 2-3401-13; 5-1115-21.

272 Rule 62. (g) Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof.

273 Secs. 2-3208, 11; 2-3220; Rules 28, 30, Supreme Court.

274 Rule 63. Disability of a Judge. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

275 See, Sec. 4-325; Reed v. Worland, (1878) 64 Ind. 216.

jurisdiction by the regular judge.[276] Certainly a clarification of the law on this point is desirable.

VIII.

Rule 64.[277] This Rule brings into the Federal procedure state law in regard to attachment, garnishment, etc. At this point the Council should consider the inadequacies of the existing Indiana procedure in this field. The Committee on Governmental Economy recommended some additions to the present provisions which I still believe to be desirable.[278]

Rule 65 (a)[279] and (b).[280] These Rules prohibit a preliminary injunction without notice, but make provision for

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276 See, Chicago, I. & L. Ry. v. Cunningham, (1903) 33 Ind. App. 145, 69 N. E. 304; Hutts v. Hutts, (1875) 51 Ind. 581; Love v. Jones, (1920) 189 Ind. 390, 127 N. E. 549.

277 Rule 64. Seizure of Person or Property. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

278 Report State Committee on Governmental Economy, pages 318-320.

279 Rule 65. Injunctions. (a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.

280 Rule 65. (b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is

a temporary restraining order without notice and provide in the latter instance for a special procedure in this connection. In general the Rules are in accord with the Indiana law,[281] but the explicit provisions for immediate hearing, etc., seem desirable additions to the practice.

Rule 65(c).[282] This is in accord with the Indiana statutes.[283]

Rule 65(d).[284] The requirement that the injunction or restraining order set forth the reasons for the issuance and be detailed in its terms has no express counterpart in Indiana procedure at the present time. The latter part of this Rule might be a restriction on the present Indiana law, although in general it states the existing law.[285]

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directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

281 See, Sec. 3-2101-4; 3-2117-20. The latter statutes provide also for granting damages on dissolution.

282 Rule 65. (c) Security. No restraining order of preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

283 Sec. 3-2107, 8.

284 Rule 65. (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

285 See, Sec. 3-2109, 11, 12, 14, 15; Anderson v. Indianapolis Drop Forge Co., (1904) 34 Ind.App. 100, 72 N. E. 277.

Rule 65(e).[286] This Rule deals with a problem peculiar to the Federal Courts.

Rule 66.[287] This Rule preserves the existing practice and rules in the United States district courts. Some of the Federal rules on this subject matter might well be adopted in the state practice, *e. g.*, the common one prohibiting the employment of the attorney for creditors as attorney for a receiver.[288]

Rule 67.[289] The Indiana practice is in general in accord.[290]

Rule 68.[291] This Rule is comparable to Secs. 2-1801-2; 2-2509, Burns' 1933, except that Sec. 2-1802 is broader than

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286 Rule 65. (e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress.

287 Rule 66. Receivers. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules.

288 See, Weil v. Neary, (1929) 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243.

289 Rule 67. Deposit in Court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Sections 995 and 996, Revised Statutes, as amended, U. S. C., Title 28, §§ 851, 852; the Act of June 26, 1934, c. 756, § 23 (48 Stat. 1236), U. S. C., Title 31, § 725v; or any like statute.

290 See, Secs. 2-223; 3-2113; 3-2610-12.

291 Rule 68. Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails

the Rule provided for confession of judgment if no action is pending.

Rule 69(a).[292] The first sentence is in accord with the Indiana practice.[293] It will be noticed that the Rule provides that a judgment for the payment of money may be enforced other than by execution if the court so orders. It is presumed that this deals primarily with an equitable decree, although the Rule is not expressly or by fair implication limited to that situation. Sec. 2-3302 makes a similar provision. It has often occurred to me that all judgments for damages might well be in form of an order to pay which could be enforced as equitable decrees are enforced (by execution or contempt) thus avoiding the necessity of an execution and supplementary proceedings in a proper case. Under supplementary proceedings contempt process is finally available to a judgment plaintiff and there appears no good reason why he should be compelled to go through the idle process of the sheriff's office with its consequent delay and political complications.

The balance of the Rule brings the state procedure on proceedings supplemental to execution into the Federal practice. At this point the Council should consider the advisability of the modification of the Indiana statutes on proceedings supplemental to execution. Again on this score the Committee

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to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

292 Rule 69. Execution. (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

293 Sec. 2-3301-17.

on Governmental Economy made some recommendations which I believe are still desirable.[294]

Rule 69(b).[295] This Rule deals with a situation peculiar to the Federal courts.

Rule 70.[296] In general Secs. 3-1001-9; 3-2419-21, Burns' 1933 are in accord with this Rule. The Rule, however, is broader applying to all cases (and thus is not limited to real property cases as are the Indiana statutes) and makes the desirable addition of dispensing with the necessity of the appointment of a commissioner and the transfer of title by virtue of a judgment so reciting.

The latter part of the Rule is in accord with the Indiana law in replevin, ejection, foreclosure, and similar cases, where a writ of execution or restitution is a proper procedure.

Rule 71.[297] No statute in Indiana covers this point,

294 Report Indiana State Committee on Governmental Economy, page 320.

295 Rule 69. (b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Section 989, Revised Statutes, U. S. C., Title 28, § 842, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

296 Rule 70. Judgment for Specific Acts; Vesting Title. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

297 Rule 71. Process in Behalf of and Against Persons Not Parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person

although as to the latter half of the rule certainly the Rule states the Indiana law.[298]

Rule 72.[299] This deals with a matter peculiar to the Federal system. A few appeals may go directly from the District Court to the U. S. Supreme Court, but practically all must go through the Circuit Court of Appeals. The Rules which follow deal with the usual situations and are the ones to be compared with the Indiana practice.

Rule 73(a).[300] This Rule and subsequent Rules on the subject of appeals preserve the existing statutes as to when an appeal is permitted and the time within which an appeal may be taken.[301] It is to be noted that an appeal is taken under this Rule when a notice is filed with the clerk. The Supreme Court of Indiana, as of Aug. 31, 1937, cut the time for appeals from final judgments from 180 to 90 days. This means that the transcript of the record must be filed within that time.[302] Rule 73(g) provides for the filing of the record in the Court of Appeals within 40 days after the filing of notice of appeal, so that the time for filing the appeal under the Rules might be as much as 130 days and as little as 40

who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

298 See *supra* Rule 65 (d).

299 Rule 72. Appeal from a District Court to the Supreme Court. When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal.

300 Rule 73. Appeal to a Circuit Court of Appeals. (a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

301 In the normal case this is 90 days; in cases relating to monopolies it is 60 days and in appeals from interlocutory orders it is 30 days. 8 Hughes, Federal Practice, (1931) Sec. 5436.

302 Cincinnati, H. & D. R. v. McCullam, (1915) 183 Ind. 556, 109 N. E. 206.

days. The second sentence if adopted in this state would repudiate a great many cases holding that all steps in appellate procedure are jurisdictional. In the light of subsequent rules most defects may be cured by amendment or other appropriate action and a dismissal as of course would not be the necessary result as it now is under the Federal practice. The notice of appeal within the time allowed is the only step which may not be waived or cured.

Rule 73(b).[303] This would modify the Indiana practice where a notice of appeal is necessary only in so-called vacation appeals if the appellant chooses to service notices below rather than obtain service of process from the appellate court, as it requires a notice of appeal in all cases. The Rule allows, as does the Indiana law, service on the attorney of record[304] if service is had below. Indiana practice, however, does not allow service on an attorney if service is delayed until after the appeal is docketed.[305] The Rule also allows service by mailing and the Indiana practice would not.

The Rule places the burden of serving notice, after it is filed, on the clerk, whereas the Indiana law places it on the appellant.[306] It makes the clerk's failure to give notice a ground for dismissal, whereas the Indiana law makes the giving of notice (below or above) jurisdictional.[307]

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303 Rule 73. (b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

304 Sec. 2-3206.

305 Tate v. Hamlin, (1895) 149 Ind. 94, 41 N. E. 356.

306 Sec. 2-3206.

307 Bechtell v. The Central Station Engineering Co., (1914) 182 Ind. 568, 107 N. E. 73; Rule 31, Indiana Supreme Court.

Rule 73(c).[308] Two types of bond are provided for by this Rule and (d) *infra.* An "appeal" bond covering costs is required in every appeal under this Rule. It is required in Indiana only where the appellant is a non-resident.[309]

Otherwise the Rules allow an appeal without stay bond[310] and in substance they are in accord with Indiana law which allows a so-called vacation appeal without bond. But as pointed out above[311] the procedure under the Federal Rules except for the giving of a supersedeas bond is the same in all appeals, whereas the Indiana law requires notice if no bond is filed below, and no notice if a bond is filed below.

Rule 73 (d)[312] and (e).[313] What was said under Rule 62(d) is pertinent here. Under these Rules the trial court

308 Rule 73. (c) Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

309 Rule 30, Indiana Supreme Court.

310 Rule 62 (d) *supra;* 73 (d) *infra.*

311 Rule 62 (d); 73 (b).

312 Rule 73. (d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the

has power to approve an appeal or supersedeas bond any time before the appeal is docketed.

Both the Rule and the Indiana statute[314] give the court discretion as to the amount of the bond. This Rule would make no substantial change in Indiana law as to the terms of the supersedeas bond.[315]

The first sentence of (e) would prevent the dismissal of an appeal for the insufficiency of a bond and give the appellant opportunity to file a proper bond either before or after the appeal is taken. Under Indiana law an appellant may file a supersedeas bond after the appeal is docketed,[316] but under it no provision is made to correct after term a defective bond taken by the trial courts.[317]

Rule 73(f).[318] This would constitute an innovation in the Indiana practice, but is similar to the present Indiana law in connection with bonds given for stay of execution.[319]

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use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

313 Rule 73. (e) Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

314 Sec. 2-3204.

315 Sec. 2-3204 was amended in 1935 to provide for the payment of the judgment if the appeal was dismissed. If the appeal is not perfected the clause as to the prosecution of the appeals protects the appellee as to damages caused by the temporary stay. See, Midland R. Co. v. Holloran, (1896), 14 Ind. App. 392, 42 N. E. 1035. The Indiana cases, however, are not conclusive on the point and this Rule expressly allowing damages for delay is desirable.

316 Sec. 2-3208-11, Burns '33.

317 Plotnicki v. Nowicki, (1920) 73 Ind. App. 383, 127 N. E. 564.

318 Rule 73. (f) Judgment Against Surety. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

319 Sec. 2-3408-9.

Rule 73(g).[320] This Rule limits the time for perfecting an appeal to forty days after the giving of notice which is similar to the present Indiana law requiring the filing of the transcript within sixty days after the giving of a bond in the term-time appeal.[321] The former Rule 2 of the Indiana Supreme Court requiring a vacation appeal to be filed within sixty days after the service of notice below has been revised and under Rule 3 of the present Rules the transcript may be filed within the time allowed for taking an appeal (ninety days after judgment). The last sentence of this Rule giving the trial court power to extend the time for a taking of an appeal is similar to the provisions of Sec. 2-3204 as to term-time appeals. No provision is made in the Indiana law, however, for an extension of time for the filing of a vacation appeal, and the Indiana statute limits the extension to a date within the time allowed for filing the transcript and the Federal Rule does not. Under Indiana law an appeal must be perfected within 90 days whereas under the Federal Rules as much as 180 days may be allowed.

Rule 74.[322] This seems to state the rules found in Sec. 2-3212-4, Burns' 1933, in much simpler form, for it is to be assumed that Rule 73 (a) and (b) as to notice would apply as against co-parties not joining in the appeal.

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320 Rule 73. (g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

321 Sec. 2-3204.

322 Rule 74. Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.

Rule 75(a).[323] This Rule is similar to the present Indiana requirement as to the praecipe for a transcript,[324] except that it requires service on the appellee, giving the latter an opportunity to enlarge the transcript if he wishes. The Indiana statutes make no provision for cross-appeals, but Rule 6, Indiana Supreme Court, provides for it. Such an appellee must use the record provided by the appellant, although presumably he might enlarge it by certiorari. In the light of the usual practice of the appellant using a transcript of the entire record the question would not be presented, but if an attempt is made to limit the transcript then a rule such as this is necessary.

Rule 75(b).[325] This Rule would modify the Indiana practice on this point to the extent that it requires the appellant to secure two copies of the reporter's transcript of the evidence or instructions rather than one. The additional copy, of course, could be secured without substantial cost. The reporter's transcript need not be complete although the appellee may require complete copies.

Rule 75(c).[326] This Rule modifies to some extent the existing Federal practice which except in unusual cases requires

323 Rule 75. Record on Appeal to a Circuit Court of Appeals. (a) Designation of Contents of Record on Appeal. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

324 Sec. 2-3222.

325 Rule 75. (b) Transcript. If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record.

326 Rule 75. (c) Form of Testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and

that the evidence in question and answer form be not included in the record, whereas the proposed rule permits its inclusion in that form, but likewise permits a condensed recital in narrative form.

The Rule would modify the Indiana practice, but substantially the results would be the same. Under the present Indiana practice the parties on appeal settle the evidence in their briefs, whereas under this Rule the parties settle it in the trial court and it is included in the Record rather than in the briefs.

Rule 75(d).[327] This Rule provides as do the Indiana statutes for an appeal on less than the entire record,[328] but requires the appellant to designate the points on which he intends to rely on appeal, so as to give the appellee an opportunity to enlarge the record to show non-reversible error, or to assign cross-errors.

Rule 75(e).[329] This Rule would constitute an innovation in the Indiana practice making a desirable provision for the omission of formal parts of exhibits and cross-references to documents appearing in the record more than once.

It will be noted that it limits Rule 75(c) to the use of evidence in other than narrative form to justifiable occasions

answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

[327] Rule 75. (d) Statement of Points. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

[328] Sec. 2-3222; 2-3114.

[329] Rule 75. (e) Record To Be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

and imposes a possible penalty against the attorneys as well as the parties for a violation of this Rule.

The purpose here is to secure as concise a statement of the evidence as is possible in the Record. As indicated above the Indiana practice is substantially in accord, but requires an appellant to secure a complete transcript of the evidence, and then reduce it to narrative form in his brief. The practice under these Rules would allow the appellant to eliminate a great deal of irrelevant and redundant material and argument from the reporter's transcript at a consequent saving of expense.

Rule 75(f).[330] This Rule allows the parties to enter into a stipulation as to the record which again would constitute an innovation in the Indiana practice although there seems to be no good reason why such a stipulation would not be valid under the existing Indiana practice.

Rule 75(g).[331] This Rule imposes upon the clerk the burden of keeping the record for appeal and prohibits unnecessary duplication and may require two copies of the record rather than one. It would alter the Indiana law on the latter point, and also in the requirement that designated parts of the record are to be certified without praecipe. (Sec. 2-3112.)

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330 Rule 75. (f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

331 Rule 75. (g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals.

It will be noted that this Rule would also repudiate the present Indiana requirements as to the bringing into the record of bill of exceptions by court action. Under this Rule those matters are filed and agreed upon the parties in abbreviated form and the clerk certifies them as part of the record as a matter of course.

Rule 75(h).[332] This Rule gives the trial court power to settle a dispute as the evidence, or any action, but it need not, as under the present Indiana practice certify the bills of exceptions or action as to instructions. (This is done by the clerk.)

The latter part of the Rule is substantially in accord with the Indiana practice under which a record may be corrected by writ of certiorari.[333]

The rule goes further than the Indiana practice where the record and the praecipe must conform and a portion not requested by praecipe may not be considered on appeal. Under this Rule any omission may be supplied.

Rule 75(i).[334] This Rule would constitute an innovation in the Indiana practice where there is no provision for the use of original papers and exhibits in the record.

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332 Rule 75. (h) Power of Court to Correct Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

333 Rule 29, Indiana Supreme Court.

334 Rule 75. (i) Order as to Original Papers or Exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

Rule 75(j).[335] This Rule would constitute an innovation in the Indiana practice where no provision is made for a procedure similar to this.

Rule 75(k).[336] As indicated in the comment under Rule 75 (a) and (d), this Rule states in substance the results of the present Indiana practice which contemplates but one record on appeal.

Rule 75(l).[337] This Rule contemplates the continuation of the present Federal practice of having the record printed after it is filed in the Court of Appeals and would constitute an innovation in the practice in this state. The Rule of the Seventh Circuit Court of Appeals on this point is copied in the note.[338]

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335 Rule 75. (j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

336 Rule 75. (k) Several Appeals. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

337 Rule 75. (l) Printing. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the circuit court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court.

338 Printing the Transcript.

1. Upon docketing an appeal the clerk shall forthwith cause an estimate to be made of the cost of printing the transcript and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the appeal may be dismissed upon the motion of the opposite party, or by the court on its own motion.

2. The clerk shall cause the transcript to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the parties at least three copies, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the transcript, agree

The most significant changes which Rule 75 would make in the Indiana practice as to the record on appeal are as follows:

(1) Instructions would be brought into the record by a stenographic report on this subject filed by the appellant or agreed to by the parties.

(2) The evidence would be brought into the record by a statement filed by the appellant which might consist simply of the reporter's transcript of the evidence in which, however, unnecessary duplications would be avoided and in which original exhibits might be included. The evidence, however, might be filed in narrative form subject to objection by the appellee and the settlement of any dispute on the point by the trial judge.

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that only parts thereof shall be printed, and the case will be heard thereon, unless otherwise ordered by the court.

3. Thirty-five copies of the transcript shall be printed and a larger number may be printed on the request of either party on the payment of the amount necessary therefor.

4. The clerk shall supervise the printing and see that the transcript is indexed and indicate briefly the character of each document and exhibit. If the cost of printing, together with the clerk's fee for preparing and supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded to the party paying the same. If the cost and the clerk's charges shall exceed the estimate, the excess shall be paid to the clerk before he shall deliver or file the printed transcript.

5. In case of reversal, affirmance or dismissal with costs, the cost of printing the transcript and the clerk's charges shall be taxed against the losing party unless the court directs otherwise.

6. The printed transcript shall be 6¾ by 10 inches in size and its cover color shall be terra cotta. It shall be printed in small pica type on clear white paper with outside margins of not less than an inch and a half. On the margin opposite any pleading or document reproduced shall appear, by note or memorandum, the date of its filing; and at the top of the page shall be printed running titles of their contents with names of witnesses where testimony appears thereon.

7. The clerk shall preserve and bind together one copy of the transcript and of each brief, printed motion and printed argument submitted thereon.

8. The clerk shall obtain sealed proposals for the printing hereinbefore provided for and submit the same to the court for its information and aid in awarding such printing. If the transcript is printed in the District Court, there may be taxed as costs the actual cost of such printing, but not exceeding the rate paid for like printing under awards in this court.

(3) Inaccuracies or omission in the record may be corrected.

(4) The record would be printed after it was filed in the court of appeals.

Rule 76.[339] Secs. 2-2201-3, Burns' 1933 provide for an agreed case and an appeal therefrom but the case must be filed as such originally. There is no Indiana provision for an agreed appeal in a case not filed originally as such.[340]

X.

Rule 77(a).[341] This Rule would permit the filing of pleadings, motions, etc., on legal holidays and during vacations between terms and the making of interlocutory orders at those times. Several Indiana statutes make express provision for the filing of emergency matters and their disposition during vacation and some are broader than this Rule, because it is to be doubted, for example, if the disposition of an action for *habeas corpus* is an interlocutory order.[342]

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339 Rule 76. Record on Appeal to a Circuit Court of Appeals; Agreed Statement. When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

340 Ch. 76, Acts 1937, making provision for an appeal "by certificate" was abrogated by Rule of the Supreme Court, dated June 21, 1937.

341 Rule 77. District Courts and Clerks. (a) District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

342 See, Sec. 2-1401, Burns '33 (change of venue); Sec. 3-2101 (injunctions); 3-2601 (receivers); 3-1216 (divorce); 3-1905 (habeas corpus); 3-2203 (mandate and prohibition).

Several Indiana statutes declare legal holidays and prohibit Sunday work.[343] Others permit the closing of the clerk's office on such day,[344] but provide for the issuance of some writs on Sunday.[345]

This Rule would make action by the court or judge lawful on those days.[346] There is a conflict in the authorities as to whether or not statutes of this character are jurisdictional.[347] I find no Indiana case in point. Were the Indiana Supreme Court convinced that the statutes are not jurisdictional a rule on the subject would be very desirable as it would remove the present doubts on the subject.

Rule 77(b).[348] The first sentence of this Rule would not alter the Indiana practice, although no statute requires a public civil trial. It is settled that a court need not convene in the regular place if inconvenient.[349] It is said in the case cited, however, that the circuit courts must be held in the county seat. This is a dictum. Statutes creating superior courts commonly designated the place of holding court. Again the authorities are not in accord as to the power of a court to convene to another place, but there is substantial authority to support the power of the court to do what the second sentence of this Rule allows.[350] A rule of this sort, if not jurisdictional, would be very desirable.

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343 Sec. 19-1916, 7; 10-4301; 49-1506; 49-602-4.

344 Sec. 49-602-4; 49-2705.

345 Sec. 3-511 (attachment); 2-3307-8 (execution); 3-1908 (*habeas corpus*).

346 Rule 5 (e) provides that "filing with Court" includes filing with the clerk.

347 25 R. C. L. pp. 1444, *et seq.*

348 Rule 77. (b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all parties affected thereby.

349 The Board of Commissioners of White Co. v. Gwinn, (1894) 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

350 7 R. C. L. pp. 992, *et seq.*

It is to be noted in connection with this Rule and Rule 77(a) that the United States Supreme Court has construed them not to be jurisdictional.[351]

Rule 77(c).[352] The first sentence is in accord with the statutes referred to under (a) above. Insofar as the second sentence allows the clerk to enter a default judgment it would alter the present Indiana law.[353] In other respects the Rule states the Indiana practice under which the clerk issues most writs. The Rule would alter the Indiana law, however, in those cases such as habeas corpus where the writ is ordered issued by the judge or court.[354]

Rule 77(d).[355] This Rule would alter the Indiana law on this subject as no notice of judgment is now required.

Rule 78.[356] No Indiana statute makes an express provision of this character, but local practice is in accord.[357]

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351 See Rule 82 *infra.*

352 Rule 77. (c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

353 See, Rule 55 *supra.*

354 Sec. 3-1905.

355 Rule 77. (d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

356 Rule 78. Motion Day. Unless local conditions make it impracticable, each district shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

357 See comment under Rule 40, *supra.*

Rule 79(a).[358] This Rule would consolidate what are known in Indiana practice as the clerk's entry docket in which the filing of a complaint is recorded and the judge's docket in which court action is noted. It would impose upon the clerk the duty of keeping what the judge now keeps as a judge's docket.[359] Sec. 49-2706, Burns' 1933 provides that the clerk shall file papers, but makes no requirement of a separate record. All pleadings and motions other than a complaint under Indiana practice are filed with the court and under Sec. 4-324 the clerk enters the court's action in the order book. This Rule therefore would impose the duty of keeping all records, other than final judgments, in a single docket in the form prescribed by the Rule. It would relieve the clerk of some of the burden under the Indiana practice of copying pleading at length in the order book.[360]

Rule 79(b).[361] This Rule is similar to the Indiana statute providing for the order book and the judgment docket to be kept by the clerk.[362]

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358 Rule 79. Books Kept by the Clerk and Entries Therein. (a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

359 See, Sec. 2-801.

360 See comment under Rule 5 (e).

361 Rule 79. (b) Civil Order Book. The clerk shall also keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all final judgments and orders, all orders affecting title to or lien upon real or personal property, all appealable orders, and such other orders as the court may direct.

362 Sec. 2-2520-3; 4-324.

Rule 79(c).[363] The practice in Indiana as to the entry docket is in accord with the first sentence of this Rule, but apparently no statute imposes this practice as a general requirement.[364]

The practice in Indiana as to the preparation of trial calendars and the separation of jury and court cases is also in accord with the second sentence of this Rule, but no statute covers the point.

Rule 80 (a)[365] and (b).[366] This is in general in accord with Sec. 4-3501-11, Burns' 1933 covering the appointment of official reporters. Under the Indiana practice, however, the reporter is paid by the county and fees for his services in court are not charged against the parties.

Rule 80(c).[367] This would constitute a modification of the Indiana practice and would avoid the necessity of calling the reporter as a witness.

Rule 81(a).[368] A similar rule in Indiana would be necessary, care being taken to preserve statutes which were not intended to be superseded by general rules.

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363 Rule 79. (c) Indices; Calendars. Separate and suitable indices of the civil docket and of the civil order book shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

364 Sec. 2-818, Burns '33, provides for an index as to *lis pendens* notices.

365 Rule 80. Stenographer; Stenographic Report or Transcript as Evidence. (a) Stenographer. A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.

366 Rule 80. (b) Official Stenographers. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

367 Rule 80. (c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

368 Rule 81. Applicability in General. (a) To What Proceedings Applicable. (1) These rules do not apply to proceedings in admiralty. They do not

Rule 81(b).[369] The writ of *scire facias* was used usually to secure enforcement of a judgment after a writ of execution

apply to proceedings in bankruptcy or proceedings in copyright unde rthe Act of March 4, 1909, c. 320, § 25 (35 Stat. 1081), as amended, U. S. C., Title 17, § 25, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the District Court of the United States for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States.

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the district courts of the United States prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), U. S. C., Title 29, §§ 159 and 160 (e), (g), and (i), for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese, or to proceedings for review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, § 21 (44 Stat. 1436), U. S. C., Title 33, § 921. The provisions for service by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, remain in effect.

(7) In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.

[369] Rule 81. (b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or

was unavailable, or to revive a judgment.[370] An Indiana statute expressly abolishes it in the J. P. courts.[371] In a good many states it has been held that the statutes on executions and revival of judgments have superseded it.[372] It would seem that such a result ought to follow in this state, as the Indiana statutes on this subject are quite complete.[373]

Certainly there is no necessity for the writ of *scire facias* and a rule abolishing it would not be out of place.

The Report of the Advisory Committee[374] abolished the writ of mandamus and provided that it be treated as a suit for a mandatory injunction. This Rule is more general in form but reaches the same result. Indiana statutes abolish the writ but provide for an action for mandate.[375] The problem here is as to whether or not the situation can better be taken care of by a general rule of this character or by the preservation of the statutory rules.

Rule 81(c).[376] These Rules deal with a subject peculiar to the Federal practice.

Rule 81(d).[377] This is a definition section. An Indiana rule covering this subject matter would be desirable.

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scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

370 24 R. C. L. pp. 666, *et seq.*

371 Sec. 5-214.

372 24 R. C. L. 666 n. 4.

373 Sec. 2-3301-17; 2-2602-13. See, Hord v. Bradbury, (1901) 156 Ind. 30, 59 N. E. 31.

374 Rule 83 (a).

375 Sec. 3-2201-5.

376 Rule 81. (c) Removed Actions. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States.

377 Rule 81. (d) District of Columbia; Courts and Judges. Whenever in these rules reference is made to a district court or to a district judge, the reference includes the District Court of the United States for the District of

Rule 81(e).[378] This Rule deals with a matter peculiar to the Federal system.

Rule 82.[379] A similar rule in Indiana as to jurisdiction would seem to be desirable. It is believed that rules as to venue and change of venue are procedural and not jurisdictional and that the Indiana Supreme Court must consider the problem of a revision of the Indiana statutory rules on those subjects.

Rule 83.[380] A similar rule in Indiana would seem to be desirable and to be in accord with Sec. 2, Ch. 91, Acts 1937.

As has been pointed out several times above, these Rules cover subject matter commonly left to local rules in Indiana, but for the sake of uniformity the Supreme Court Rules should invade those fields where uniformity is desirable.

Rule 84.[381] A similar provision in Indiana would seem to be desirable, but of course would constitute an innovation.[382]

Columbia or a justice thereof; and whenever reference is made to a circuit court of appeals or to a judge thereof, the reference includes the United States Court of Appeals for the District of Columbia or a justice thereof.

[378] Rule 81. (e) Law Applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the District Court of the United States for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

[379] Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

[380] Rule 83. Rules by District Courts. Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

[381] Rule 84. Forms. The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.

[382] The Forms adopted by the Federal Rules are not set out due to lack of space.

Rule 85.[383] A similar provision in Indiana would seem to be desirable.

Rule 86.[384] A similar provision in Indiana would seem to be necessary. Provision would have to be made also for the publication and distribution of any general rules promulgated as well as any addition of or additions to them.*

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[383] Rule 85. Title. These rules may be known and cited as the Federal Rules of Civil Procedure.

[384] Rule 86. Effective Date. These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

* In the first installment of this article in discussing Rule 12 (g) (p. 224), the author stated that the consolidation of motions was permissive. Members of the Advisory Committee inform me that the intention of the Rule is to make consolidation compulsory, with the exception noted in the last clause of the Rule.

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Restatement of Law of Trusts

Leon H. Wallace, Terre Haute, appointed to annotate for Indiana the Restatement of the Law of Trusts.